

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 AUSTIN DIVISION

3 BOOK PEOPLE, INC., ET AL) Docket No. A 23-CA-858 ADA
4)
4 vs.) Austin, Texas
5)
5 MARTHA WONG, IN HER)
6 OFFICIAL CAPACITY AS THE)
6 CHAIR OF THE TEXAS STATE)
7 LIBRARY AND ARCHIVES)
7 COMMISSION, ET AL) August 28, 2023

8 TRANSCRIPT OF MOTION HEARING (Resumed)
9 BEFORE THE HONORABLE ALAN D. ALBRIGHT

10 APPEARANCES:

11 For the Plaintiff: Mr. Michael J. Lambert
12 Mr. W. Reid Pillifant
13 Ms. Laura L. Prather
14 Ms. Catherine L. Robb
15 Haynes & Boone, LLP
16 600 Congress Avenue, Suite 1300
17 Austin, Texas 78701

16 For the Defendant: Ms. Christina Cella
17 Ms. Amy E. Pletscher
18 Texas Attorney General's Office
19 300 West 15th Street, 6th Floor
20 Austin, Texas 78711

20 Court Reporter: Ms. Lily Iva Reznik, CRR, RMR
21 501 West 5th Street, Suite 4153
22 Austin, Texas 78701
23 (512) 391-8792
24

25 Proceedings reported by computerized stenography,
transcript produced by computer-aided transcription.

09:04:27 1 THE COURT: Good morning, everyone.

09:04:28 2 Would you call the case, please?

09:04:29 3 THE CLERK: Court calls: A-23-CV-858, BookPeople

09:04:34 4 Inc. Et Al vs. Martha Wong, Et Al, for a motions hearing.

09:04:37 5 THE COURT: Announcements from counsel, please.

09:04:39 6 MS. PRATHER: Your Honor, Laura Prather with
09:04:44 7 Catherine Robb, Michael Lambert, Reid Pillifant, all from
09:04:47 8 Haynes & Boone on behalf of the plaintiffs.

09:04:50 9 MS. CELLA: Good morning, your Honor.

09:04:51 10 Christina Cella and Amy Pletscher for defendants.

09:04:57 11 THE COURT: Let me start off by asking a question
09:05:04 12 I asked last time in terms of timing of when we have to
09:05:10 13 have the decision made by and I think I'm going to start
09:05:14 14 with the defendant. But is my understanding, correct --
09:05:22 15 by the way, I'm not planning on taking a very long time to
09:05:25 16 do this. I'm trying to find out whether or not there's a
09:05:28 17 drop-dead date of just the 1st because that's when the
09:05:31 18 statute would become effective.

09:05:36 19 Is it my understanding that it's the -- I think
09:05:40 20 at the last hearing you saying that until, I believe,
09:05:43 21 April, there's not going to be any enforcement of this; is
09:05:46 22 that correct?

09:05:46 23 MS. CELLA: Correct, your Honor, because that's
09:05:48 24 when the lists are due.

09:05:49 25 THE COURT: Okay. And so, what I'm trying to

09:05:51 1 figure out here, then I'll turn to the plaintiff and ask
09:05:54 2 again, I would rather get out -- I mean, if we have to, we
09:06:01 3 have to. But I'd rather get out an order that I think was
09:06:05 4 well considered than feel constrained to get one out by --
09:06:09 5 in a day or two. And so, let me hear from the plaintiff
09:06:11 6 if the defendants' representing that there's not going to
09:06:16 7 be any enforcement on this week, even when the statute
09:06:22 8 goes into effect, I'd like to know why we have to have a
09:06:26 9 decision out by this Thursday. And I think that also
09:06:31 10 indirectly impacts the issue of the injunction, one of the
09:06:37 11 prongs of the injunction in terms of the immediacy of the
09:06:40 12 harm. I think that was your point last time, too.

09:06:42 13 MS. PRATHER: Yes, your Honor.

09:06:43 14 THE COURT: Is if there's no -- if the
09:06:49 15 enforcement's not going to begin until April 1st; is that
09:06:52 16 right?

09:06:53 17 MS. CELLA: Yes.

09:06:53 18 THE COURT: Then why we have to have something
09:06:55 19 out by this Thursday.

09:06:58 20 MS. PRATHER: Your Honor, there's a few reasons
09:07:00 21 for that.

09:07:01 22 THE COURT: If you'd come up to the podium.

09:07:03 23 MS. PRATHER: Sure. Your Honor, unfortunately,
09:07:14 24 the plain language of the statute says that it goes into
09:07:17 25 effect on September the 1st.

09:07:19 1 THE COURT: And you said that last time but the
09:07:23 2 representation from counsel is, there won't be enforcement
09:07:25 3 of it. So I get that, you know -- but it's not like
09:07:31 4 they're changing the drinking age from 21 to 18 and so, on
09:07:34 5 Thursday, an 18-year-old can -- my representation from
09:07:38 6 counsel is that there will be no enforcement starting this
09:07:41 7 week.

09:07:42 8 MS. PRATHER: Yeah. My understanding for the
09:07:45 9 representation was that the lists were due on April 1st
09:07:48 10 but under Section 35.002(a), the vendors cannot sell
09:07:56 11 library materials to the district until they have issued
09:07:59 12 their ratings on the prior sold books that are in active
09:08:04 13 use.

09:08:05 14 And if your Honor looks at two cases, one is U.S.
09:08:09 15 vs. Stevens, which is a Supreme Court case from 2010, it
09:08:15 16 specifically states that the First Amendment is protected
09:08:19 17 against the government and we cannot be left at the mercy
09:08:23 18 of representations by the government that they will not
09:08:27 19 uphold an unconstitutional statute just because they're
09:08:31 20 promising not to do something, we cannot rely on that
09:08:34 21 promise.

09:08:35 22 The same thing happened in the American
09:08:39 23 Booksellers case where the attorney general's
09:08:42 24 representation about what the state law said or how it
09:08:45 25 would be interpreted is not considered authoritative and

09:08:49 1 cannot bind the courts or the local authorities.

09:08:53 2 We simply cannot wait until after September 1st
09:08:57 3 because the law under Section 6, Section 7, and under the
09:09:02 4 express provision in 35.002(a) immediately takes effect
09:09:08 5 September 1st and will have an irreparable harm. Our
09:09:14 6 clients will incur irreparable harm starting on that date.
09:09:17 7 As I mentioned in the prior hearing, as well, these
09:09:21 8 ratings that the booksellers are obligated to be doing
09:09:28 9 have to be done now. It's not like they do it on March
09:09:33 10 31st. It's like discovery: It happens throughout the
09:09:38 11 ongoing months between.

09:09:42 12 THE COURT: From my looking -- and I'll hear from
09:09:45 13 the government on this. My understanding was that the
09:09:50 14 April 1st was not a make-believe date. It was an
09:09:53 15 understanding that if the law went into effect on the 1st
09:09:57 16 that it was essentially a window to give the folks the
09:10:02 17 opportunity to comply with it and that's why it wouldn't
09:10:04 18 be enforced before April 1st. That's the way the law is
09:10:08 19 structured, isn't it?

09:10:09 20 MS. CELLA: Yes, your Honor, because the lists
09:10:10 21 are not due till April 1st. There's nothing to enforce
09:10:13 22 before that.

09:10:14 23 THE COURT: And so, that's where I'm having a
09:10:16 24 really hard time with plaintiffs' argument if there's this
09:10:19 25 irreparable harm on September 1st, when the lists aren't

09:10:23 1 due until April 1st.

09:10:26 2 MS. PRATHER: There's a couple of irreparable
09:10:28 3 harm. One is it's just an express prohibition. They
09:10:31 4 can't sell after September 1st if they don't have the
09:10:34 5 prior books rated, they're prohibited from selling after
09:10:40 6 September 1st. That's one thing. The second thing is,
09:10:43 7 they're going to incur costs and those costs are going to
09:10:48 8 be ongoing between now throughout the pendency of the next
09:10:54 9 however many months until April 1st to rate and review
09:10:58 10 these books.

09:10:58 11 And that cost alone causes irreparable harm.
09:11:02 12 There was testimony before the Senate committee about the
09:11:08 13 costs that -- that that would entail and the fact that it
09:11:13 14 would be literally the review of millions of books that
09:11:16 15 would have to be happening. All that doesn't happen on
09:11:20 16 March 31st. That happens now and it happens now over the
09:11:24 17 course of several months.

09:11:25 18 THE COURT: And again, I'm not talking about
09:11:29 19 waiting till April 1st. I'm trying to figure out why if,
09:11:33 20 for example, the order came out Friday, it doesn't -- I'm
09:11:38 21 having a hard time seeing irreparable harm between
09:11:40 22 Thursday and Friday.

09:11:42 23 MS. PRATHER: The irreparable harm is that they
09:11:43 24 cannot sell books starting September 1st.

09:11:52 25 THE COURT: Okay. Anything else from the

09:11:54 1 government?

09:11:56 2 MS. CELLA: Not on that point, your Honor.

09:11:57 3 THE COURT: Okay. Then we'll take up the
09:12:01 4 following issues. First, we're going to start off with --
09:12:07 5 and, Ms. Prather, you're in the right place. These
09:12:09 6 questions are primarily for you and then, I'll hear from
09:12:13 7 the defendant. We have two issues to take up, I think, to
09:12:24 8 determine whether or not the Court has the power to do
09:12:27 9 anything here. The first is standing.

09:12:29 10 So, Ms. Prather, if you'd come back up, please.
09:12:43 11 Are you the standing person?

09:12:49 12 MR. LAMBERT: No, sir. I'm just the tech person.

09:12:51 13 THE COURT: Okay.

09:13:13 14 MS. PRATHER: Judge, one other thing with regard
09:13:15 15 to this April 1st date. If there's no enforcement until
09:13:18 16 April 1st, then the law should actually have an effective
09:13:20 17 date of April 1st. It doesn't. It has an effective date
09:13:23 18 of September 1st and it applies to the 2023-2024 school
09:13:27 19 year. So if they're saying now, which the Court cannot
09:13:31 20 rely on, that they aren't planning to enforce until April
09:13:34 21 1st, then at a minimum, what the Court should do between
09:13:37 22 now and Friday is enter an injunction that says they can't
09:13:41 23 enforce it between now and April 1st. That's a happy
09:13:45 24 medium with the Court can then get out a more thoughtful
09:13:49 25 order after Friday, but effectively enjoin the law between

09:13:55 1 now and April 1st.

09:13:56 2 THE COURT: Oh, I'm not -- I'm thinking a day or
09:14:03 3 two. I'm not -- I have no intention of delaying till
09:14:08 4 April 1st getting this order out. It's more it's Monday
09:14:11 5 and I think the 1st is Thursday. And so -- but I'll think
09:14:16 6 about if I have to doing something that would be
09:14:20 7 restrictive for a day or two if I need a time to get the
09:14:25 8 order out.

09:14:26 9 At any rate, so with respect to these
09:14:28 10 requirements, I want you to focus on how they apply to the
09:14:34 11 school districts. How are they different -- how is this
09:14:39 12 requirement passed by the legislature different than any
09:14:43 13 other contract terms that may have the ability to set up
09:14:48 14 for plaintiffs to deal with when they're doing business
09:14:49 15 with the districts? I mean, you --

09:14:52 16 MS. PRATHER: Your Honor -- I'm sorry.

09:14:53 17 THE COURT: I understand you're unhappy with this
09:14:55 18 one but why doesn't the -- why don't they have the power
09:14:59 19 to have this requirement if they have the power to have
09:15:02 20 other requirements for school districts?

09:15:07 21 MS. PRATHER: Your Honor, the standing in this
09:15:10 22 case has nothing to do with a contractual relationship.
09:15:14 23 The standing here is based upon a pre-enforcement facial
09:15:21 24 challenge to a constitutionally infirm statute, which is
09:15:26 25 permissible under the First Amendment. We've got several

09:15:29 1 different First Amendment issues that are at stake here:
09:15:33 2 The right to distribute books, the right to be free from
09:15:36 3 compelled speech, the right to receive information. And
09:15:39 4 under Virginia II, the U.S. Supreme Court said that
09:15:44 5 booksellers can bring pre-enforcement facial challenges to
09:15:47 6 statutes that restrict their ability to sell protected
09:15:50 7 works.

09:15:51 8 So that is just one basis for there to be
09:15:54 9 standing in this case. I'm happy to go through more, your
09:15:58 10 Honor. Is it okay to proceed with my argument or --

09:16:01 11 THE COURT: Yes, please.

09:16:02 12 MS. PRATHER: Okay.

09:16:06 13 THE COURT: This is -- I got to pick on the other
09:16:08 14 side at the first hearing because that was just the way it
09:16:13 15 was -- the issues we're going to face today are whether or
09:16:17 16 not the plaintiff had standing. And also, we didn't
09:16:22 17 really get into the sovereign immunity issue because I
09:16:25 18 didn't have a chance to get your briefing on that, but
09:16:28 19 we're going to get into that today, as well.

09:16:30 20 MS. PRATHER: Okay, your Honor. And the
09:16:32 21 preliminary injunction.

09:16:33 22 THE COURT: Yes.

09:16:34 23 MS. PRATHER: I assume. Okay. So I actually had
09:16:39 24 -- this has been top of mind for me, this case for the
09:16:42 25 last 10 days, perhaps for others as well, and what I

09:16:47 1 started thinking about, your Honor, was the impact that
09:16:52 2 that one teacher seems to have on every person. There's
09:16:57 3 always one that made a difference in their life and for
09:17:00 4 me, it was Ms. Peterson. She was the one that sparked
09:17:03 5 curiosity in that sense of wonder for me.

09:17:05 6 THE COURT: Counsel, I don't care. I want to
09:17:10 7 move forward. This isn't a trial. Just jump ahead,
09:17:16 8 please.

09:17:18 9 MS. PRATHER: Okay. So we're here today because
09:17:21 10 we represent a coalition of booksellers, book publishers
09:17:25 11 and authors that sell books to Texas schools. That's the
09:17:29 12 who of this case. What the case is about is about the
09:17:35 13 state requiring ratings of books and adoption of state
09:17:38 14 ratings by vendors. It's not about TEA controlling the
09:17:42 15 curriculum. In fact, books that are part of the
09:17:47 16 curriculum are expressly exempted from this statute. The
09:17:53 17 speech at issue is the right to distribute and sell books
09:17:57 18 and to be free from compelled speech.

09:18:01 19 H.B. 900 expressly does not apply to curriculum.
09:18:08 20 So what has to happen in this case? All books have to be
09:18:12 21 rated. All books that are in active use have to be rated.
09:18:17 22 When? By September 1st, otherwise, they can no longer
09:18:22 23 sell books to schools. How this is done is actually
09:18:28 24 impossible. If you look at the statute, it actually begs
09:18:34 25 more questions than it answers. It begs the question of

09:18:38 1 whether or not a book is directly related to curriculum,
09:18:41 2 whether or not it is in active use, what constitutes
09:18:47 3 sexual activity or sexually explicit, what is sexually
09:18:51 4 explicit, how this three-factor balancing test is
09:18:55 5 employed, what community standards are to be looked at,
09:19:01 6 how it does not matter how old the reader is, and one of
09:19:06 7 the things that is completely left out is how the books
09:19:11 8 are acquired. What happens if books are donated, what
09:19:13 9 happens if books are purchased by the teacher from a
09:19:16 10 garage sale. Those books aren't covered by this. This
09:19:20 11 only applies to book vendors, so if the goal here is to
09:19:23 12 have all books in all libraries of public schools rated,
09:19:28 13 it misses the mark.

09:19:30 14 There was testimony in the Senate that just six
09:19:35 15 school districts alone had more than six million items in
09:19:38 16 their library and there are over 1,200 school districts in
09:19:42 17 the state of Texas. Now, why has this law been passed?
09:19:47 18 Because the state wants books rated, but they don't want
09:19:52 19 to do the work themselves and they don't want to pay for
09:19:57 20 it. It has been demonstrated by the declarations in
09:20:01 21 support of this case.

09:20:02 22 THE COURT: So I hear what you're saying. I
09:20:10 23 don't understand what you mean by as of -- if the books
09:20:13 24 aren't rated by Thursday, they can't sell them. What
09:20:19 25 prohibits that in the statute?

09:20:21 1 MS. PRATHER: 35.002(a).

09:20:24 2 THE COURT: Could you read that to me?

09:20:27 3 MS. PRATHER: Yes, your Honor. And we have a
09:20:28 4 notebook for you, your Honor. H.B. 900 is behind the
09:20:31 5 third tab in the notebook.

09:20:33 6 THE COURT: I think this is disputed, isn't it?

09:20:37 7 MS. PRATHER: Yes, your Honor.

09:20:38 8 THE COURT: Okay.

09:20:40 9 MS. PRATHER: I'm sorry?

09:20:41 10 THE COURT: I said I think that the state
09:20:44 11 disagrees with what you're telling me and so, if you'll
09:20:47 12 tell me where that specific statute is. I have H.B. 900.
09:20:55 13 Would it be here or would it be --

09:20:57 14 MS. PRATHER: Yes. If you go to 35.002(a), third
09:21:03 15 page of the statute, it says a library material vendor may
09:21:10 16 not sell library materials to a school library or open
09:21:16 17 enrollment charter school unless the vendor has issued
09:21:21 18 appropriate ratings regarding sexually explicit material,
09:21:26 19 sexually relevant material, previously sold to a school
09:21:30 20 district or school.

09:21:34 21 Then if you go to Section 6 of the bill, which is
09:21:43 22 on the seventh page, it says the changes in law made by
09:21:52 23 this act to the educational code apply beginning with --
09:21:58 24 with the 2023-2024 school year. Turn the page to Section
09:22:04 25 7 and it says that if this act does not receive the vote

09:22:10 1 necessary for immediate effect, which it did not, this act
09:22:14 2 takes effect September 1st, 2023.

09:22:28 3 THE COURT: Well, what impact does Section (b) of
09:22:33 4 -- Subsection (b) of Section 4 have? This says not later
09:22:36 5 than September 1st, 2024, each library material vendor
09:22:42 6 will submit the initial updated list required.

09:22:48 7 MS. PRATHER: That's the updated list.

09:22:49 8 THE COURT: As opposed to the initial list.

09:22:51 9 MS. PRATHER: Correct, your Honor.

09:22:52 10 THE COURT: Okay. And so, let's say it's Friday
09:23:01 11 and I've done nothing. On Friday, can your clients no
09:23:08 12 longer sell books to a school district if they're not
09:23:13 13 rated?

09:23:14 14 MS. PRATHER: Under the plain language of the
09:23:16 15 statute, yes.

09:23:18 16 THE COURT: Okay. Let me hear from the attorney
09:23:20 17 general as to why she disagrees with that.

09:23:23 18 MS. CELLA: Your Honor, the statute --

09:23:25 19 THE COURT: If you'll come.

09:23:28 20 MS. CELLA: Oh. Your Honor, the statute, it
09:23:45 21 can't be parsed out like that. So although the bill is
09:23:47 22 effective on September 1st, the lists are not due till
09:23:51 23 April 1st. So as I mentioned, there's nothing to enforce.
09:23:54 24 The introduced version of the bill actually had that the
09:23:57 25 lists were due on September 1st, Thursday of this week,

09:24:02 1 but that got changed. So there's just nothing to enforce.

09:24:07 2 So I'm not really sure the fear is just it's just
09:24:10 3 conjecture. There's nothing to enforce until April 1st
09:24:14 4 when those lists are due.

09:24:16 5 THE COURT: Okay. And as of April 1st, let's say
09:24:18 6 it is April 1st or March 30th or 31st, what happens then
09:24:26 7 if they haven't created these lists?

09:24:28 8 MS. CELLA: The -- if they have not submitted the
09:24:31 9 list to TEA, the school districts cannot purchase books
09:24:35 10 from them. The way -- and I think we talked about this
09:24:37 11 last time but the way that's enforced is through the
09:24:41 12 education code, the TEA has the option to open a special
09:24:48 13 investigation to determine if the school districts have
09:24:49 14 complied and if so, they can -- there are sanctions in the
09:24:52 15 education code they would be against school districts, not
09:24:55 16 against any book vendors. In fact, TEA specifically told
09:24:58 17 me they have no jurisdiction against any book vendor.
09:25:01 18 It's all against school districts.

09:25:02 19 THE COURT: Say that again. I'm sorry.

09:25:04 20 MS. CELLA: TEA specifically told me that any
09:25:08 21 enforcement, any jurisdiction they have would be against a
09:25:13 22 school district, not against a book vendor.

09:25:14 23 THE COURT: And what would that enforcement
09:25:16 24 entail?

09:25:17 25 MS. CELLA: So it's laid out in the education

09:25:19 1 code once they open a special investigation, depending on
09:25:24 2 their findings, there's certain sanctions that can be
09:25:27 3 issued against the school districts.

09:25:28 4 THE COURT: So if school district bought -- I
09:25:32 5 want to make sure I'm right. This is a situation where if
09:25:35 6 on April 2nd, the school district continued to buy books
09:25:40 7 from a vendor that had not rated them, then there would be
09:25:44 8 an issue of between TEA and the school district.

09:25:48 9 MS. CELLA: There could be. It's not definite
09:25:50 10 but it's an option they have. They can open up a special
09:25:52 11 investigation.

09:25:53 12 THE COURT: Okay. Is what you're telling me the
09:25:59 13 school districts would have the power to continue to
09:26:02 14 purchase from vendors even if they had not rated the books
09:26:08 15 only -- the problem would be they would face potential
09:26:12 16 liability from the TEA.

09:26:13 17 MS. CELLA: Correct.

09:26:14 18 THE COURT: Okay. So again, with regard -- and
09:26:17 19 I'll have Ms. Prather respond to this, too. With regard
09:26:20 20 to the standing issues for her clients in challenging
09:26:25 21 this, what impact do you think that scenario -- that
09:26:28 22 reality has that there's not a direct enforcement by
09:26:34 23 anyone against -- I think what I hear you saying is
09:26:37 24 there's no direct enforcement -- there can be no direct
09:26:41 25 enforcement against vendors. It could impact the vendors

09:26:46 1 if they don't turn in the list and the school districts
09:26:50 2 decide not to purchase from them. I'm not saying there's
09:26:53 3 not an impact, but in terms of penalties, there is no
09:26:57 4 potential for penalties in this case against this group of
09:27:02 5 plaintiffs.

09:27:02 6 MS. CELLA: Correct.

09:27:03 7 THE COURT: So what impact do you think that that
09:27:04 8 has on standing?

09:27:06 9 MS. CELLA: Well, we believe there's no standing
09:27:08 10 at all in this case. Any -- like we just said, any
09:27:12 11 enforcement would be against someone that's not the
09:27:15 12 plaintiffs, the school districts. But that's one of the
09:27:19 13 biggest reasons we believe there's no standing. And I can
09:27:21 14 go into the other issues unless you want me to wait
09:27:23 15 until --

09:27:23 16 THE COURT: Let me hear from Ms. Prather.

09:27:25 17 MS. CELLA: Sure.

09:27:26 18 THE COURT: I am going to get to them and so...

09:27:29 19 MS. CELLA: Thank you, your Honor.

09:27:30 20 THE COURT: Yes, ma'am. So, Ms. Prather, I'm not
09:27:32 21 ignorant of the fact that this could -- would have --
09:27:39 22 could have an impact. I see that. But if you could
09:27:42 23 respond to counsel's argument that there is no direct
09:27:45 24 action that could be taken against -- again, from the
09:27:48 25 perspective of standing, what impact that has on standing

09:27:58 1 because your argument is that the law will damage your
09:28:03 2 client and/or that there could be a penalty for this
09:28:09 3 against your client and I don't see the penalty.

09:28:11 4 MS. PRATHER: The penalty is that they will no
09:28:12 5 longer be able to sell books.

09:28:14 6 THE COURT: That's not a penalty. I get that
09:28:16 7 that's an impact. But that's not a penalty that's being
09:28:22 8 enacted by the state. And in fact, the school districts
09:28:28 9 could continue to buy the books, right?

09:28:32 10 MS. PRATHER: Not under the express terms of
09:28:34 11 the --

09:28:34 12 THE COURT: Well, no. They could decide to
09:28:38 13 continue to -- they would have to deal with the TEA but
09:28:41 14 they could continue to buy them, right?

09:28:44 15 MS. PRATHER: The express provisions of the
09:28:46 16 statute prohibit that.

09:28:48 17 THE COURT: I understand that. But that's only
09:28:53 18 -- there's an enforcement mechanism against them doing it
09:28:55 19 but the school districts could choose to do it.

09:28:58 20 MS. PRATHER: Which honestly, your Honor, is all
09:29:00 21 the more reason why a preliminary injunction needs to be
09:29:02 22 entered here because --

09:29:04 23 THE COURT: No, no. Stick with the standing.
09:29:07 24 I'm trying to figure out -- I want you to give me -- the
09:29:10 25 standing issue's a very difficult one for your side and I

09:29:13 1 want you to give me the very best argument you can give me
09:29:16 2 as to why you have standing. I want to give you every
09:29:19 3 opportunity to do that.

09:29:21 4 MS. PRATHER: Sure. We have standing on a number
09:29:23 5 of grounds.

09:29:23 6 THE COURT: Okay.

09:29:24 7 MS. PRATHER: So the first is, we have standing
09:29:27 8 under the First Amendment. We have standing because this
09:29:32 9 deals with the constitutional rights of the booksellers.
09:29:36 10 Those constitutional rights that are at issue are the
09:29:39 11 right to distribute books, the right to be free from
09:29:41 12 compelled speech, that compelled speech is the
09:29:45 13 TEA-required ratings and the right to receive information.
09:29:49 14 Under Virginia II, all of these pre-enforcement challenges
09:29:53 15 were recognized as a basis for standing.

09:29:57 16 In the Speech First vs. Fenves case, that's one
09:30:01 17 which Judge Yeakel denied a preliminary injunction based
09:30:04 18 upon a lack of standing and the Fifth Circuit overturned
09:30:08 19 Judge Yeakel, and they overturned Judge Yeakel because
09:30:12 20 they allowed for pre-enforcement challenge of a campus
09:30:16 21 speech policy that violated the First Amendment. The
09:30:21 22 chilling effect is --

09:30:22 23 THE COURT: I don't think that's an -- I mean, I
09:30:27 24 don't think this is an analogous case to that. I don't
09:30:32 25 think that that -- I think it's different when you are

09:30:35 1 restricting that kind of speech than what you're doing
09:30:38 2 here. I'm really trying to burrow down and find out your
09:30:43 3 best standing argument under this act that y'all are the
09:30:49 4 appropriate people to bring the case.

09:30:50 5 MS. PRATHER: We're the appropriate people to
09:30:52 6 bring the case because our First Amendment rights are at
09:30:54 7 issue. There's a potential chilling effect that has
09:30:58 8 already gone into effect as a result of this statute,
09:31:03 9 we've already got libraries that are refusing to purchase
09:31:06 10 books from our clients and others, which is a basis for
09:31:11 11 standing in and of itself, we've got an injury in fact.
09:31:17 12 That injury in fact arises from the Katy Independent
09:31:21 13 School District where they have said we are no longer
09:31:24 14 buying books. And Blue Willow, one of our clients, has
09:31:29 15 submitted a declaration.

09:31:29 16 THE COURT: Well, has anyone complied with this
09:31:36 17 statute?

09:31:38 18 MS. PRATHER: Katy Independent School District
09:31:40 19 has already.

09:31:40 20 THE COURT: Any vendor.

09:31:42 21 MS. PRATHER: Complied with it? Meaning
09:31:44 22 submitted ratings?

09:31:45 23 THE COURT: Uh-huh.

09:31:46 24 MS. PRATHER: Not yet. Not that I'm aware of.

09:31:49 25 THE COURT: I would think. So how is Katy ISD

09:31:56 1 going to get books?

09:31:59 2 MS. PRATHER: Well, Katy ISD has already said
09:32:01 3 that they're not purchasing any books until they see
09:32:03 4 ratings. They haven't seen ratings, they're not
09:32:05 5 purchasing books.

09:32:06 6 THE COURT: Okay. And if none of the vendors do
09:32:10 7 rating -- rate their books, where are they going to get
09:32:13 8 books? I'm saying if no one, if none of the vendors do
09:32:26 9 the ratings, where will they get the books? I mean, you
09:32:30 10 say Katy ISD has told your vendors this but essentially,
09:32:34 11 they're just -- to the extent they're just complying with
09:32:38 12 the statute on this, they're saying to all vendors, right?

09:32:48 13 MS. PRATHER: Yes.

09:32:48 14 THE COURT: Okay. So -- and this goes back to my
09:32:54 15 question of why is this any different than any other
09:32:59 16 requirement that the state might impose on what school
09:33:05 17 districts do in terms of their selection of books?

09:33:10 18 MS. PRATHER: This has nothing to do with
09:33:12 19 curriculum. I think your Honor may be getting confused
09:33:14 20 with regard to curriculum versus non-curriculum. The
09:33:18 21 state can put parameters on books for curriculum. This is
09:33:22 22 not that. In fact, books related -- that are directly
09:33:26 23 related to curriculum are exempt from this statute.

09:33:30 24 So what we've got here is, we have a First
09:33:34 25 Amendment basis for standing. We have under Susan B.

09:33:40 1 Anthony vs. Driehaus, we've got an injury in fact. Katy
09:33:44 2 Independent School District, we've got imminent injury,
09:33:48 3 which you don't even have to have an jury in fact as long
09:33:51 4 as you have imminent injury. And we have imminent injury,
09:33:55 5 as well, which is the chilling effect of schools not
09:33:58 6 purchasing books. We've got financial harm, which is the
09:34:03 7 cost of review. And just earlier this month, the Fifth
09:34:06 8 Circuit said economic harm was the quintessential Article
09:34:13 9 III injury in the mifepristone case. Here, we have to
09:34:16 10 begin -- our clients have to begin the costly process of
09:34:19 11 identifying, rating and recalling books under the statute.
09:34:22 12 That is economic harm.

09:34:24 13 THE COURT: Well, but why can't the state -- I'm
09:34:30 14 not saying it's a good idea but why can't the state
09:34:32 15 require them to do whatever the state wants to and if the
09:34:36 16 cost is too great, if the financial cost is too great,
09:34:41 17 then they don't sell books to schools.

09:34:43 18 MS. PRATHER: They can't require them to do
09:34:45 19 something that's unconstitutional, your Honor.

09:34:46 20 THE COURT: I know that. What I'm saying is
09:34:51 21 here, let's assume for a second, the ratings are -- let's
09:34:55 22 leave out -- aside the constitutional issue. Why can't
09:35:01 23 the state require them to do these ratings?

09:35:05 24 MS. PRATHER: It's -- the Constitution -- you
09:35:08 25 can't really set aside the constitutional issue. This is

09:35:11 1 compelled speech.

09:35:12 2 THE COURT: Okay.

09:35:13 3 MS. PRATHER: They can't compel them to speak.

09:35:17 4 THE COURT: Again, if under your scenario then,
09:35:21 5 if plaintiffs wouldn't give every book a rating of no
09:35:25 6 rating, where's the injury?

09:35:28 7 MS. PRATHER: The injury is still in the fact
09:35:30 8 that they have had to review the books. There's costs to
09:35:33 9 review.

09:35:34 10 THE COURT: Why do they have to review the books?

09:35:36 11 MS. PRATHER: Under the statute, they're required
09:35:37 12 to review the books.

09:35:39 13 THE COURT: Where does it say they have to review
09:35:41 14 the books?

09:35:54 15 MS. PRATHER: Under Section 35.001, it requires
09:36:00 16 the library material vendor not to be able to sell the
09:36:03 17 books until there are ratings that have been issued.

09:36:07 18 THE COURT: Where does it say they have to review
09:36:10 19 the books? That's what your harm -- where does it say
09:36:14 20 they have to review the books as opposed to just giving
09:36:16 21 them a rating?

09:36:24 22 MS. PRATHER: If you look at the 35.003 provision
09:36:27 23 that talks about the agency reviewing the ratings.

09:36:30 24 THE COURT: That's agency -- that's your
09:36:35 25 get-out-of-jail free card. Your company gives -- your

09:36:39 1 company complies tomorrow and says we've given every book
09:36:44 2 we're selling a rating of no rating and you're done.

09:36:54 3 MS. PRATHER: The statute requires -- in addition
09:36:57 4 to them giving the initial rating, it requires them, it
09:37:01 5 says it shall, the vendors shall rate the library
09:37:04 6 materials according to the agency's corrected ratings. So
09:37:09 7 that's the second layer of this.

09:37:10 8 THE COURT: Well, that -- we don't know that the
09:37:12 9 agency's going to do that.

09:37:15 10 MS. PRATHER: Well, the agency is meeting this --
09:37:17 11 I mean, the state board of education --

09:37:19 12 THE COURT: Agency hasn't done that yet. There's
09:37:22 13 no injury there yet. I'm saying tomorrow, your client
09:37:31 14 gives every book that they want to sell to any school
09:37:35 15 district a rating of no rating. There's no requirement
09:37:37 16 that you've cited to me that they have to review any of
09:37:41 17 these books which eliminates the harm of the cost of
09:37:44 18 reviewing them. They've complied with the statute. We
09:37:48 19 know that the TEA is going to -- has the power to. We
09:37:51 20 don't know that they will, but we know that they have the
09:37:53 21 power to review any of the ratings that you've been given.
09:37:57 22 We know then if they're unhappy with them, then they get
09:38:01 23 to make the change. You don't have a right to appeal.

09:38:06 24 So at that point, any change that's made to the
09:38:08 25 rating that you gave of no rating to something else is not

09:38:13 1 your speech, it's the TEA's speech. That rating would be
09:38:18 2 -- you could put on the books, Of Mice And Men is now
09:38:24 3 whatever the TEA says it needs to be and they could put
09:38:28 4 it's a TEA rating. Not our rating because your rating was
09:38:31 5 no rating.

09:38:33 6 MS. PRATHER: Well, okay. Couple of things.
09:38:36 7 Page 4 of H.B. 900, Section 35.0021 says that a library
09:38:45 8 material vendor must perform a contextual analysis of the
09:38:52 9 material to determine whether the material describes,
09:38:56 10 depicts, or portrays sexual conduct any way that is
09:39:02 11 patently offensive. It requires the vendor to perform a
09:39:06 12 contextual analysis. That's one thing.

09:39:09 13 Second thing you brought up, well, they can just
09:39:12 14 say it's TEA's ratings. They can't. Under the provisions
09:39:17 15 of the statute, TEA forces them to either accept their
09:39:22 16 ratings as their own, TEA publishes those ratings as the
09:39:27 17 vendor's ratings on their website or they can no longer
09:39:34 18 sell books to Texas schools. So they don't get -- the
09:39:38 19 vendor doesn't get to say these are TEA's ratings.

09:39:40 20 THE COURT: And what section is that in that you
09:39:44 21 just said with regard to the TEA makes the publishers say
09:39:50 22 that it's the publisher's rating and not the TEA rating?

09:39:53 23 MS. PRATHER: You have to look at two provisions,
09:39:55 24 your Honor.

09:39:55 25 THE COURT: Okay.

09:39:56 1 MS. PRATHER: On the fifth page, Section
09:39:59 2 35.003(b) talks about the fact that TEA will let the
09:40:08 3 vendor know essentially if they disagree with the ratings
09:40:12 4 and then, the vendor shall rate the library material
09:40:17 5 according to the agency's corrected rating.

09:40:21 6 THE COURT: All right. That's the agency's
09:40:23 7 corrected rating.

09:40:24 8 MS. PRATHER: Understood. Then you look to 35.
09:40:31 9 -- this is on page 4, you look at 35.001(e) and it says
09:40:46 10 the agency shall post each list submitted under subsection
09:40:50 11 (c) and (d), okay? (C) and (d) are the ones where you're
09:40:57 12 posting the ratings and you're posting those who don't
09:41:01 13 comply with them in a conspicuous place on the agency's
09:41:05 14 internet website as soon as practicable.

09:41:23 15 THE COURT: I don't see either -- if I'm looking
09:41:26 16 at the right one, 35.002(c), is that what you're citing me
09:41:36 17 to, (c) and (e)?

09:41:37 18 MS. PRATHER: Just a second. 35.003.

09:41:50 19 THE COURT: Okay. I'm on the wrong one.

09:41:58 20 MS. PRATHER: 003(b). So (a) and (b). (a)
09:42:03 21 requires the vendor's rating. (b) requires the vendor to
09:42:09 22 adopt the state's rating if they disagree.

09:42:23 23 THE COURT: I don't see anything in 35.003 that
09:42:27 24 prevents your clients from making it clear that this is
09:42:30 25 the agency's corrected rating and not theirs.

09:42:33 1 MS. PRATHER: It doesn't go on the vendor's
09:42:36 2 website. It goes on TEA's website. They don't have any
09:42:39 3 control over what goes on TEA's website.

09:42:42 4 THE COURT: Right. So how does that impact --
09:42:46 5 how is that speech from your client?

09:42:49 6 MS. PRATHER: Because they're forcing our client
09:42:51 7 to adopt TEA's ratings and if they don't adopt TEA's
09:42:55 8 ratings, then they can't do business in Texas anymore.
09:42:59 9 Those corrected ratings are what goes on the TEA website
09:43:03 10 as though they are the vendor's speech.

09:43:06 11 THE COURT: I don't see that at all. They go on
09:43:08 12 the agency's website.

09:43:10 13 MS. PRATHER: They go on the agency's website as
09:43:13 14 the vendor's ratings.

09:43:15 15 THE COURT: I don't -- am I -- it's the vendor
09:43:26 16 shall rate the library material according to the agency's
09:43:29 17 corrected ratings, which is -- they could say those are
09:43:32 18 the agency's corrected ratings, not the vendor's.

09:43:36 19 MS. PRATHER: They don't get to decide what they
09:43:37 20 say. It goes on the agency's website. They don't get to
09:43:41 21 write out what's on the agency's website.

09:43:43 22 THE COURT: It's clear it's the agency's ratings
09:43:46 23 and not your clients'.

09:43:48 24 MS. PRATHER: It's attributed to our client. The
09:43:51 25 agency has -- they post and they maintain this list on

09:43:56 1 their website of the vendor's ratings.

09:44:02 2 THE COURT: Okay. Could I hear a response to
09:44:05 3 that? I don't know what I'm missing and I'm not getting
09:44:09 4 there. Ms. Prather says it's compelled speech because it
09:44:24 5 would be on the vendor's site and my sense is it would be
09:44:28 6 the agency's corrected ratings, but I may be missing
09:44:31 7 something.

09:44:32 8 MS. CELLA: Yes, your Honor. It would be the
09:44:33 9 agency's corrected ratings because they have the oversight
09:44:38 10 over the final ratings.

09:44:41 11 THE COURT: So do you see any issue with
09:44:44 12 compelled speech in that situation?

09:44:46 13 MS. CELLA: No, your Honor.

09:44:47 14 THE COURT: Okay. Wouldn't it be -- I mean,
09:44:54 15 because as I understand, it's not like these ratings are
09:44:57 16 going to be on the books. It's going -- they're going to
09:45:02 17 be posted on the agency site, correct?

09:45:07 18 MS. CELLA: Correct.

09:45:07 19 THE COURT: And so here, even if it was -- if it
09:45:15 20 had to do with the vendors, what those vendors had, it's
09:45:18 21 only because the vendor is selling that group of books,
09:45:21 22 but the ratings would be the agency's ratings, correct?

09:45:23 23 MS. CELLA: Yes. That's correct.

09:45:24 24 THE COURT: So if the vendor started off with no
09:45:28 25 rating and that got amended by the TEA and that rating was

09:45:32 1 put in -- then the vendor would have a choice, okay, we're
09:45:37 2 not -- we disagree with that, but then, they just wouldn't
09:45:39 3 be able to sell the book, right?

09:45:42 4 MS. CELLA: They would -- if they don't correct
09:45:45 5 the rating, then they cannot sell -- well, the schools
09:45:48 6 cannot purchase books from them.

09:45:51 7 THE COURT: But according to the agency's
09:45:53 8 ratings, not the vendor's ratings.

09:45:56 9 MS. CELLA: According to the agency's ratings,
09:45:57 10 yes.

09:45:57 11 THE COURT: Okay. At any rate, okay. I think I
09:46:05 12 have that. Okay. Let me have Ms. Prather again. If
09:46:07 13 there's anything else you'd like to say with regard to
09:46:11 14 standing, I'd like to hear it and I'll hear from
09:46:13 15 defendant. And I get your point that the vendor's name is
09:46:28 16 on the ratings. I get -- I see where the issue is. So...

09:46:36 17 MS. PRATHER: The (c) and (d) that is being
09:46:37 18 referenced in 35.002(e) is the (c) and (d) of the vendor's
09:46:44 19 ratings. So in addition to the standing that is for
09:46:55 20 pre-enforcement challenge of an unconstitutional statute
09:46:59 21 expressly provided under Virginia II and Speech First,
09:47:05 22 we've also established that there is an injury in fact and
09:47:10 23 an imminent injury. We've talked about the cost of
09:47:13 24 review. We've talked about the imminent harm the fact
09:47:17 25 that this takes effect September 1st. We've talked about

09:47:20 1 there is a credible threat of compelled speech, which
09:47:24 2 under 303 Creative, a case handed down in June of this
09:47:28 3 year by the Supreme Court, is prohibited. The plaintiff
09:47:33 4 cannot be required to assume the state's speech as its
09:47:40 5 own.

09:47:41 6 And then, we've talked about -- or we haven't
09:47:43 7 talked about yet the ability of the plaintiffs to bring a
09:47:47 8 claim based upon third parties' rights. And here, we have
09:47:52 9 also brought a claim based upon the third-party rights of
09:47:56 10 other publishers and students to receive information.
09:48:01 11 We've got a big problem with this statute from the
09:48:04 12 overbreadth standpoint.

09:48:05 13 THE COURT: Where does your client -- it may or
09:48:10 14 may not be an issue but where does your client have
09:48:13 15 standing with respect to the information that kids would
09:48:18 16 get in school from school libraries?

09:48:23 17 MS. PRATHER: Your Honor, under 303 Creative, we
09:48:27 18 are permitted to bring claims on behalf of other parties,
09:48:32 19 on behalf of third parties who have an interest in
09:48:36 20 receiving information, and here, the students have an
09:48:40 21 interest in receiving information. Standing --

09:48:44 22 THE COURT: I'm not following you. And I've read
09:48:47 23 that case. I'm pretty familiar with it. I don't see how
09:48:51 24 that case applies to this scenario given the facts of that
09:48:56 25 case. Help me out with that. I don't see how your

1 clients have standing in this case to advocate for the
2 students' interests.

3 MS. PRATHER: Your Honor, there's a series of
4 cases, U.S. Supreme Court and otherwise, that permit this.
5 One of them is the Department of Commerce vs. New York
6 case that allows for standing to be based on the
7 predictable effect of the government action on the
8 decisions of third parties. Here, you've got librarians
9 that are already acting under this law that is a
10 predictable effect of H.B. 900. You've got the inability
11 of students to access information.

12 Under Bantam Books vs. Sullivan, book
13 distributors had standing to challenge laws prohibiting
14 the distribution of objectionable books to minors. This
15 is not just something that is based upon the rights of the
16 plaintiffs in this case, but because the unconstitutional
17 effects of this law permeate throughout, there are also --
18 there is also the right to be able to bring this case on
19 behalf of the rights of those third parties.

20 Here, we've got a credible threat of enforcement,
21 as well. I know that the AG's office claims that they
22 won't enforce it, but the reality is, they can't make that
23 claim and bind this court. We have the First Amendment
24 protecting against the government. This is the U.S. vs.
25 Stevens case where this court cannot rely upon the

09:50:45 1 attorney general to make some promise that they won't
09:50:49 2 enforce a statute. The statute has an effective date of
09:50:53 3 September 1st. They can't promise around it.

09:50:56 4 At the prior hearing, the attorney general said
09:51:00 5 -- the attorney general's counsel said that the law
09:51:02 6 definitely could be enforced in the future and that it's
09:51:06 7 likely the defendants in this case will be the ones to
09:51:09 8 enforce it.

09:51:12 9 So we next move on to traceability and that
09:51:17 10 traceability is directly to the defendants in this case.
09:51:26 11 Redressability is the third factor. If H.B. 900 is
09:51:30 12 enjoined, then we'll no longer need to review and rate
09:51:33 13 these books. We can resume selling books to public
09:51:37 14 schools and we won't be forced to adopt the state speech
09:51:43 15 as our own.

09:51:47 16 Here, once again, the attorney general has
09:51:50 17 admitted there's no mechanism for the plaintiffs to
09:51:54 18 receive relief under this statute. The only way in which
09:51:57 19 we can get relief is through this court right now. How do
09:52:01 20 we get relief? How do they get relief, your Honor asked
09:52:05 21 at the last hearing, and the response was, well, your
09:52:09 22 Honor, maybe they can't. An injunction is the only way
09:52:13 23 that we can get relief and a favorable ruling here will
09:52:18 24 permit the plaintiffs not to have to incur the costs to be
09:52:24 25 able to resume selling books and to not have to be

09:52:28 1 compelled to speak against their will.

09:52:35 2 Should I move on to sovereign immunity, your
09:52:37 3 Honor?

09:52:37 4 THE COURT: No. I'll hear from the government on
09:52:38 5 standing and then, I'll have her come back on sovereign
09:52:42 6 immunity. And by the way, when you see me typing, I don't
09:53:01 7 want you to think I'm not listening. My clerk and I are
09:53:05 8 going back and forth on what y'all are saying. So I don't
09:53:07 9 mean to be rude here if it's just where we're at.

09:53:15 10 MS. CELLA: Your Honor, as you pointed out,
09:53:19 11 there's no enforcement against the plaintiffs. You had
09:53:23 12 pointed that out and that's exactly correct. That's
09:53:26 13 exactly what the statute says. I'd also like to point out
09:53:30 14 that there are -- there's no guarantee of the plaintiffs
09:53:34 15 being able to sell books to public schools. There's just
09:53:38 16 no right to distribute books. There are certain
09:53:41 17 procurement guideline -- or standards and guidelines that
09:53:46 18 public schools have to follow when they're purchasing
09:53:49 19 books.

09:53:49 20 So in order for a vendor to sell those books to
09:53:54 21 the school districts, the school district has to follow
09:53:57 22 those guidelines. So there's just no guarantee, there's
09:54:00 23 no property right of the vendors to sell any books. And
09:54:06 24 as far as the standing on a third party, a party generally
09:54:11 25 must assert his own legal rights and interests and cannot

1 rest his claim to relief on the legal rights or interests
2 of third parties. That's in Kowalski vs. Tesmer.

3 To confer third-party standing, a party must show
4 a close relationship with the person who possesses the
5 rights. Plaintiffs have made no effort to plead and they
6 cannot confer third-party standing so that they have to
7 show that they actually have standing here and they just
8 don't. There's no threat of enforcement against them.
9 There's no harm. They have no property right to sell
10 these books to public schools in Texas. If they want to
11 do that, they need to follow what the state guidelines and
12 the state legislature has set forth.

13 And I believe that we talked about this last time
14 so I apologize if I am repeating myself but the threat --
15 and we just talked about, a couple of minutes ago, any
16 threat of enforcement, which there's none, but even if
17 there was, it's not imminent. April 1st is, I believe,
18 seven months from Thursday. So there's just no standing.

19 THE COURT: I don't think the imminence of the
20 April 1st and the standing have a lot to do with each
21 other, but I mean, I get both points. But what about
22 going back to the issue Ms. Prather raised? What impact
23 -- do you not see any injury to the plaintiff because it
24 will be on -- even on the agency's website, it will be the
25 vendor -- it will appear to be the vendor's ratings?

09:56:00 1 MS. CELLA: No, your Honor. There would be no
09:56:01 2 injury to plaintiffs. It is government speech in order to
09:56:05 3 engage in a contract basically with public schools, these
09:56:11 4 ratings are required. They're TEA's -- TEA has oversight
09:56:13 5 so they're TEA's ratings. As far as it being on the
09:56:18 6 website, that's just required in the statute. That
09:56:21 7 doesn't make it not TEA's. It's still TEA's ratings and
09:56:28 8 it would be on -- I think you pointed out, it would be on
09:56:31 9 TEA's website so that's clearly the agency rating.

09:56:35 10 THE COURT: Would -- and it hasn't happened yet.
09:56:42 11 But when I'm looking at those ratings for -- if I go to --
09:56:48 12 so it's going to be on the TEA website, right?

09:56:51 13 MS. CELLA: Yes.

09:56:51 14 THE COURT: And then, is there going to be some
09:56:53 15 way -- someone going to the TEA website could find ratings
09:56:58 16 by a publisher or something? How would -- how are these
09:57:03 17 going to be categorized -- how are these going to be put
09:57:05 18 up?

09:57:06 19 MS. CELLA: I am not 100 percent sure but I
09:57:09 20 believe it's going to be the list that the vendor -- the
09:57:11 21 publisher submits. So I do think it may say -- I'm not
09:57:15 22 100 percent sure, your Honor, but it may say who the
09:57:19 23 vendor is.

09:57:19 24 THE COURT: So publisher Barnes & Noble sends in
09:57:24 25 their list and they have no ratings. When they send them

09:57:28 1 a list, they put no ratings on everything. Number one,
09:57:32 2 it's an open question -- well, let me go back and what do
09:57:37 3 you understand this statute to say where the vendor must
09:57:42 4 perform a contextual analysis? What does that mean?

09:57:48 5 MS. CELLA: Sure. So they need to review that
09:57:50 6 book to determine if it fits in these -- the certain
09:57:55 7 requirements on how they rate the book.

09:57:57 8 THE COURT: Every book they're selling, they need
09:57:59 9 to go back and do a contextual analysis of?

09:58:02 10 MS. CELLA: Well, according to the statute, yes,
09:58:06 11 I mean, they do need to do a good-faith effort to comply
09:58:08 12 with the law and rate these books.

09:58:10 13 THE COURT: And what about Ms. Prather's argument
09:58:11 14 about the expense of doing it?

09:58:15 15 MS. CELLA: Again, your Honor, they have no
09:58:16 16 property right to sell these books to the school. They
09:58:18 17 don't have to engage in that. It's not like these books
09:58:21 18 are being restricted for sale anywhere. It's just in
09:58:25 19 public schools.

09:58:29 20 THE COURT: I got it. And then, flipping back,
09:58:33 21 if Barnes & Noble sends in their list, it says no ratings
09:58:36 22 on a hundred percent of the books, which is what I had
09:58:41 23 suggested to see if there's harm and what is under this
09:58:47 24 statute, what obligation does the TEA have to even double
09:58:53 25 check on any of the ratings?

09:58:55 1 MS. CELLA: It's not mandated. It's a may. They
09:58:58 2 may rate them. So they are not required to. They may,
09:59:02 3 they may not.

09:59:04 4 THE COURT: So -- give me one second. And then,
09:59:15 5 the TEA goes back through under my scenario, decides if Of
09:59:20 6 Mice And Men needs to have a higher rating, a more
09:59:23 7 restrictive rating, and tells Barnes & Noble that. Barnes
09:59:29 8 & Noble then has to amend its rating on its vendor list
09:59:35 9 when they -- I guess that's the second one that's due in a
09:59:39 10 year after April. But that's going to be -- it will be on
09:59:45 11 the Barnes & Noble list but it will be on the agency
09:59:47 12 website.

09:59:48 13 MS. CELLA: Correct.

09:59:49 14 THE COURT: And is there any way for Barnes &
09:59:51 15 Noble to indicate that that rating is the TEA's rating and
09:59:55 16 not theirs?

09:59:56 17 MS. CELLA: There's nothing in the statute
09:59:58 18 preventing them from doing that.

10:00:02 19 THE COURT: Okay. Do you have anything else you
10:00:05 20 wanted to say on standing? You said you might have other
10:00:08 21 arguments, I'm happy to hear them if you have any.

10:00:10 22 MS. CELLA: Just on that point, I think I may
10:00:12 23 have said this but if not, you know, if the vendor decides
10:00:16 24 they don't want to correct that rating to TEA's rating,
10:00:20 25 they can always just take their business somewhere else.

10:00:24 1 They don't have to sell to public schools and I think I
10:00:26 2 made that point. But I do believe that it would be
10:00:31 3 assumed or it should be assumed that any list that's
10:00:34 4 listed on a state agency website is the state agency's.

10:00:38 5 THE COURT: Got it. Anything else from --

10:00:44 6 MS. CELLA: That's all I have on this piece.

10:00:45 7 THE COURT: Ms. Prather, if there's anything else
10:00:47 8 you want to say on standing. And also, why would the
10:00:54 9 Court not be more prudent to wait and see if there was
10:00:58 10 actually some kind of enforcement action against one of
10:01:01 11 your clients? I mean, in other words, you give -- you
10:01:07 12 comply -- I guess, number one, what y'all are saying is,
10:01:13 13 you don't want to comply. You don't want to go through
10:01:15 14 the expense of doing this. I get that. But if you were
10:01:21 15 to mark all of the books that you are selling to the
10:01:27 16 libraries -- I'm sorry, to the school districts no rating,
10:01:35 17 why wouldn't you have standing prior to the -- some
10:01:39 18 enforcement action by the state?

10:01:41 19 MS. PRATHER: Your Honor, it's not that we don't
10:01:44 20 -- I think saying that we don't want to comply, it is
10:01:48 21 impossible to comply with this statute. Counsel just said
10:01:53 22 that we have to make a good-faith effort to review all the
10:01:56 23 books. They've admitted we have to review all the books.

10:02:00 24 THE COURT: I guess that's why I go back and it's
10:02:03 25 not really a question as much as an observation. You're

10:02:07 1 welcome to comment on it. If it's financially -- if your
10:02:13 2 clients are financially unable to do it, I don't know
10:02:17 3 whose would; and at that point, why wouldn't the
10:02:21 4 legislation just fail because the school districts
10:02:24 5 wouldn't be able to buy any books, right? If no one
10:02:29 6 complies with this, then where do they get their books?

10:02:33 7 MS. PRATHER: Well, and then, there's the
10:02:35 8 constitutional harm to everyone, right, which I guess goes
10:02:38 9 back to the third-party standing issue.

10:02:41 10 THE COURT: I'm less sure that you have standing
10:02:44 11 for that. But what I'm saying is, if this law is as
10:02:51 12 impossible to comply with as you're indicating it is, then
10:02:57 13 why won't it be impossible for everybody and why won't
10:03:01 14 this wind up essentially being a veto over anyone being
10:03:07 15 able to sell books, which is a different issue that would
10:03:11 16 have to be brought?

10:03:12 17 MS. PRATHER: I mean, I don't think -- I mean,
10:03:17 18 the role of the federal court here is to weed out
10:03:20 19 unconstitutional statutes.

10:03:21 20 THE COURT: I'm familiar with my role. That's
10:03:25 21 not my question. Again, my question is, you're acting
10:03:30 22 like it's -- would be financially impossible for you all
10:03:38 23 to do this and has some component in it that y'all are
10:03:43 24 unable to but others would be able to. That's what I'm
10:03:47 25 trying to figure out here is why the law won't fail if no

10:03:52 1 one is able -- if you're correct and no one will be able
10:03:55 2 to comply with it, then ultimately, it can't be enforced.
10:03:58 3 I mean, the schools won't be getting any books, which is a
10:04:03 4 terrible thing, I think.

10:04:06 5 Let me make clear but, again, I'm just trying to
10:04:10 6 ferret -- I'm trying to do the best I can to determine
10:04:13 7 where you have standing. Is there anything else you
10:04:16 8 wanted to say with regard to standing?

10:04:18 9 MS. PRATHER: Yes. I mean, I guess there's -- I
10:04:24 10 think we very clearly establish standing based upon a
10:04:27 11 whole host of different reasons. The First Amendment
10:04:31 12 pre-enforcement issue, the injury in fact issue, the cost
10:04:38 13 of review, the imminent harm, the credible threat of
10:04:42 14 compelled speech, and the injuries to the third parties.

10:04:47 15 And back to the injuries of the third parties,
10:04:49 16 there are two cases that we cited in our response at pages
10:04:52 17 8 and 9, Serafine vs. Branaman and Broadrick vs. Oklahoma.
10:04:59 18 One is a Fifth Circuit case, one is a U.S. Supreme Court
10:05:02 19 case, and in both of those instances, people were
10:05:05 20 permitted to have standing on behalf of third parties to
10:05:09 21 challenge various statutes that impacted the third party's
10:05:16 22 rights. In Broad --

10:05:17 23 THE COURT: And -- I'm sorry.

10:05:19 24 MS. PRATHER: In Broadrick vs. Oklahoma, the
10:05:21 25 litigants were permitted to challenge a statute not

1 because their own rights of freedom of expression were
2 violated but because of the judicial prediction or
3 assumption that the statute's very existence, much like
4 this statute, may cause others not before the Court to
5 refrain from constitutionally protected speech or
6 expression. Those two cases support the fact that we do,
7 in fact, have standing to bring this claim on behalf of
8 third parties, which is only one of the bases for
9 standing.

10 The issue of property rights is a complete red
11 herring here. The AG's brought up the issue of, well,
12 they don't have a property right. We don't need a
13 contract to have standing here. We're not challenging any
14 existing contract. The plaintiffs have already
15 established that they have collectively engaged in
16 millions of dollars in sales with school districts and
17 that they plan to continue to sell books to the school
18 districts of Texas. Standing can be established based on
19 this predictable effect of the government action on the
20 decisions of third parties.

21 And the last thing I want to bring up and this
22 just was in response to one of the Court's questions that
23 the Court asked if the booksellers would be able to
24 indicate that these were TEA's ratings and the response
25 was interesting. The response was, there's nothing in the

10:06:47 1 statute preventing them from doing that. Well, there is
10:06:51 2 something in the fact that TEA controls its website; the
10:06:55 3 booksellers don't. They don't control what is put up
10:07:01 4 there and what is being put up there has already by
10:07:04 5 statute been indicated, it will be the vendor's list and
10:07:09 6 that vendor's list will include the compelled speech of
10:07:11 7 the state.

10:07:14 8 THE COURT: And I don't know if you've had the
10:07:19 9 opportunity to do it but has anyone made any calculation
10:07:24 10 -- maybe it was done back when the law was being debated
10:07:29 11 at the House and Senate. Were there any estimates of the
10:07:33 12 actual cost it would be to the different entities like
10:07:36 13 yours, or the other plaintiffs, or other companies?

10:07:40 14 MS. PRATHER: So there are declarations in the
10:07:42 15 record, one of which is from Blue Willow and in that
10:07:46 16 declaration, the bookseller estimates that it will be
10:07:52 17 hundreds of millions of dollars that it will cost them.
10:07:57 18 Also, we talked about this a little bit at the last
10:07:58 19 hearing, which we've discussed the fiscal note that was
10:08:02 20 put on this bill and that fiscal note --

10:08:04 21 THE COURT: I remember that.

10:08:06 22 MS. PRATHER: You remember that.

10:08:07 23 THE COURT: Could you move to sovereign immunity?

10:08:11 24 MS. PRATHER: Yes, your Honor.

10:08:13 25 We believe that sovereign immunity has been

1 waived in this case under the Ex Parte: Young exception
2 which applies, and it applies very clearly, because the
3 complaint alleges an ongoing violation of federal law and
4 it seeks relief properly characterized as prospective.
5 Here, the plaintiffs seek only injunctive relief and
6 they've sued defendants in their official capacity based
7 on this ongoing constitutional violation. It clearly
8 falls within the Ex Parte: Young exemption.

9 You don't have to have an actual enforcement.
10 That's not required as your Honor said in your case, the
11 Calhoun vs. Collier case. Instead, you just have to have
12 -- there we go. Instead, just have to have an enforcement
13 -- you just have to have the defendants have pervasive
14 authority to oversee and enforce a rating system that is
15 premised on compulsion and constraint. That is exactly
16 what this law is. The compulsion is, you're compelling
17 booksellers to issue and accept TEA's ratings. The
18 constraint --

19 THE COURT: Or not sell.

20 MS. PRATHER: Or not sell. But that, too, is a
21 constitutional violation. You're impeding their ability
22 to distribute books, which is constitutionally protected.
23 The constraint is from selling the books. So here, we've
24 got the admission by the attorney general's office that
25 enforcement would fall with the defendants in this case.

10:09:57 1 We've got establishment of compulsion or constraint and
10:09:59 2 we've got establishment of the connection to the
10:10:03 3 enforcement.

10:10:07 4 We also have the fact that what we're asking for
10:10:10 5 here is simply for a federal court to command that the
10:10:18 6 defendants refrain from violating the plaintiffs'
10:10:21 7 constitutional rights. They are not asking them to do
10:10:25 8 anything other than refrain from violating federal law.
10:10:30 9 This all falls within the Ex Parte: Young exemption to
10:10:36 10 sovereign immunity.

10:10:39 11 Would you like for me to go on?

10:10:42 12 THE COURT: Sure.

10:10:43 13 MS. PRATHER: The attorney general's office has
10:10:45 14 brought up three or four different red herrings in this
10:10:49 15 case and those red herrings deal with things like a claim
10:10:54 16 that this is somehow government speech. This is not
10:10:59 17 government speech and, in fact, it's very clear that it's
10:11:03 18 not government speech because the government is not the
10:11:06 19 one who is reviewing and rating these books in the first
10:11:10 20 instance. They're requiring the bookseller to do so.

10:11:13 21 So it really makes no sense since these initial
10:11:16 22 ratings are being required of private vendors and those
10:11:23 23 ratings, keep in mind, are being --

10:11:24 24 THE COURT: I'm not following you. I'm not
10:11:30 25 following how making them give a rating is compelled

10:11:34 1 speech. I mean, they can put whatever rating they want on
10:11:37 2 them, right?

10:11:38 3 MS. PRATHER: Well, I mean, it's compelled speech
10:11:41 4 because they have to follow the criteria that's in the
10:11:45 5 statute and they don't agree with that criteria. The
10:11:48 6 declarations in the record specifically --

10:11:50 7 THE COURT: What do you mean they don't? So
10:11:53 8 what. I mean...

10:11:55 9 MS. PRATHER: Well, they're being forced to rate
10:11:57 10 something as either sexually explicit or sexually relevant
10:12:00 11 and they don't agree with the criteria that characterizes
10:12:03 12 something as sexually relevant or sexually explicit.
10:12:07 13 That's compelling them to put a rating on a book that they
10:12:12 14 don't agree with the criteria. That's the first problem.

10:12:18 15 The second problem is when the state disagrees
10:12:20 16 with the rating they've put and then, they're compelled
10:12:23 17 again to adopt the state's ratings. In any event, it's
10:12:31 18 not government speech. This compelled rating system,
10:12:35 19 which is being forced on the private vendors, is going to
10:12:39 20 be posted on the Worldwide Web as though it is their own
10:12:42 21 and it will have an impact on their ability well beyond
10:12:49 22 the parameters and the borders of this state. It goes up
10:12:53 23 on the Worldwide Web so it impacts them everywhere.

10:12:58 24 THE COURT: Or they can choose just not to sell
10:13:01 25 books in Texas.

10:13:04 1 MS. PRATHER: Which, once again, your Honor,
10:13:06 2 would be a violation of their First Amendment rights.
10:13:08 3 They have the right to distribute books under the
10:13:12 4 Constitution. That is a protected First Amendment right.
10:13:16 5 So what we're dealing with here --

10:13:18 6 THE COURT: They have a right -- the school
10:13:24 7 districts have 100 percent of the right to state who they
10:13:27 8 buy from, correct?

10:13:28 9 MS. PRATHER: They can decide who they buy from,
10:13:30 10 yes, your Honor.

10:13:30 11 THE COURT: So -- okay. I mean -- go ahead.

10:13:44 12 MS. PRATHER: So the issue here is whether or not
10:13:46 13 this is government speech. It's not. It's private vendor
10:13:49 14 speech that's being forced upon it by the government. The
10:13:54 15 ratings here.

10:13:55 16 THE COURT: But only if they want to be eligible
10:13:58 17 to sell books to the school districts.

10:14:01 18 MS. PRATHER: Your Honor, they have sold books to
10:14:02 19 the school districts for decades. They have indicated
10:14:06 20 that they would like to continue to sell books to the
10:14:10 21 schools. That establishes their standing to be able to
10:14:13 22 challenge this law, which will inhibit their ability to
10:14:16 23 sell books in the state of Texas. The speech at issue
10:14:21 24 here is pure speech. It is speech that is protected by
10:14:24 25 the First Amendment because it communicates ideas, the

10:14:29 1 idea of whether these books contain sexually explicit or
10:14:32 2 sexually relevant information, and the problem is that the
10:14:37 3 state is compelling them to speak in a particular manner,
10:14:40 4 which is unconstitutional under 303 Creative.

10:14:46 5 THE COURT: I don't -- I'm having a hard time
10:14:54 6 with the 303 Creative analysis. And what I'm having a
10:15:06 7 hard time with, too, is in terms of sovereign immunity,
10:15:12 8 why the state can't take whatever steps it wants in terms
10:15:17 9 of determining on behalf of the school districts what they
10:15:21 10 will and won't have in the school libraries.

10:15:25 11 MS. PRATHER: This isn't curriculum, your Honor.
10:15:27 12 This goes beyond curriculum. If it were curriculum, that
10:15:30 13 would be one thing.

10:15:31 14 THE COURT: So libraries are outside of
10:15:33 15 curriculum?

10:15:34 16 MS. PRATHER: Yes.

10:15:38 17 THE COURT: Okay.

10:15:42 18 MS. PRATHER: What this statute does is, it sets
10:15:44 19 up a process.

10:15:45 20 THE COURT: Why is that? I mean, but why can't
10:15:54 21 the state decide what it's going to allow the school
10:16:00 22 districts -- what books they are going to have in the
10:16:04 23 school library and what manner in which they will be
10:16:08 24 accessible to the kids? Why is that not a function that
10:16:11 25 the state has the power to have?

10:16:15 1 MS. PRATHER: The removal of books, your Honor,
10:16:19 2 which this court -- Judge Pitman dealt with in the Llano
10:16:23 3 County case.

10:16:23 4 THE COURT: That's a public library. That's a
10:16:27 5 public library and I don't think -- it has nothing to do
10:16:31 6 with the school library in my opinion.

10:16:33 7 MS. PRATHER: Your Honor, the school library is
10:16:36 8 also similar to a public library, a place that goes beyond
10:16:43 9 curriculum. If you look at the Texas Administrative Code
10:16:46 10 and the sections that deal specifically with student
10:16:50 11 libraries, they talk about it enhancing and exceeding the
10:16:54 12 curriculum the ability to evoke and instill curiosity in
10:17:00 13 students beyond the school day. It is not limited to
10:17:04 14 curriculum.

10:17:05 15 THE COURT: You're not going to convince me that
10:17:08 16 sexually explicit materials should be allowed in a school
10:17:10 17 library, which is not what Judge Pitman was dealing with
10:17:14 18 in a public library.

10:17:17 19 MS. PRATHER: I'm not trying to.

10:17:18 20 THE COURT: Well, the other -- as I understand
10:17:23 21 it, only sexually explicit books are prohibited from being
10:17:27 22 in the library. My understanding is that all other books
10:17:31 23 could be in the school library.

10:17:33 24 MS. PRATHER: The way that the law is written,
10:17:35 25 sexually explicit books, which are not tied to the

10:17:38 1 definition of obscenity, which means that they actually
10:17:42 2 prohibit constitutionally protected works from being in
10:17:46 3 the library, which is problematic, would be removed.

10:17:52 4 Sexually relevant books would be put into a separate
10:17:55 5 section where the parents could decide whether --

10:17:58 6 THE COURT: So your argument is that the state
10:18:02 7 doesn't even have the power to deal with sexually explicit
10:18:04 8 in a school?

10:18:06 9 MS. PRATHER: My argument is, they've exceeded
10:18:08 10 the Constitution in their definition of sexually explicit,
10:18:10 11 which is problematic. The sexually explicit definition is
10:18:13 12 not tied to Miller v. California. It's not tied to the
10:18:17 13 penal code provision which outlines the criteria in Miller
10:18:22 14 v. California and so, therefore, it reaches
10:18:24 15 constitutionally protected works and that's problematic.
10:18:27 16 It's overbroad.

10:18:32 17 THE COURT: Anything else on sovereign immunity?

10:18:35 18 MS. PRATHER: No, your Honor.

10:18:36 19 THE COURT: Okay. A response.

10:18:57 20 MS. CELLA: Your Honor, the defendants are
10:19:00 21 entitled to sovereign immunity. It has not been expressly
10:19:04 22 waived and Ex Parte: Young does not apply. I believe I
10:19:07 23 went through that last time, but I'm happy to do that
10:19:09 24 again if you'd like.

10:19:11 25 THE COURT: A lot has gone on between then and

10:19:14 1 now. I'd be happy for you to repeat it. I certainly
10:19:17 2 understand no waiver. You don't need to spend a lot of
10:19:22 3 time on that. But I'm not -- I haven't cuddled up with Ex
10:19:31 4 Parte: Young very much and so, I'm happy to hear anything
10:19:35 5 plaintiffs want to say about it. I'm happy for you to
10:19:37 6 explain why it doesn't give them a right to be here.

10:19:41 7 MS. CELLA: Sure.

10:19:42 8 THE COURT: I'm familiar enough with it. I
10:19:44 9 understand the Ex Parte: Young doctrine. I'm just not
10:19:48 10 familiar with if there are any particular cases that apply
10:19:51 11 here, I wouldn't know that.

10:19:52 12 MS. CELLA: So mostly what I want to point out is
10:19:55 13 that the plaintiffs can only overcome sovereign immunity
10:19:59 14 when they're seeking prospective injunctive relief based
10:20:02 15 on an alleged ongoing violation of federal law. We don't
10:20:06 16 have that here. There is no ongoing violation. They also
10:20:09 17 lack a sufficient connection and we talked --

10:20:11 18 THE COURT: I think that their argument would be
10:20:15 19 it's the Constitution -- their First Amendment claim that
10:20:19 20 gets them out of -- Ms. Prather can correct me if I'm
10:20:23 21 wrong. But I think that that's where they believe that
10:20:27 22 they get around the sovereign immunity.

10:20:30 23 MS. CELLA: Sure. And they just don't have a
10:20:33 24 First Amendment right in this particular forum in the
10:20:36 25 public school libraries. And I believe we talked about

1 that last time, as well. There's a lot of case law on
2 that, so there's just no First Amendment violation. I'm
3 sorry.

4 THE COURT: It's okay. What is your best case
5 that essentially stands -- that separates school -- public
6 school libraries from what we might be -- in my mind at
7 least and, again, I'm not a First Amendment judge. I'm
8 doing the best I can. But I do see a distinction between
9 the case Judge Pitman has in a public library, a public
10 library so the general public and school libraries and the
11 power that the state and that TEA and school districts
12 oughta have with respect to the books that are available
13 in them.

14 What do you think is your best case or two with
15 respect to the First Amendment issue in public school,
16 public libraries?

17 MS. CELLA: Sure. So Bethel School District No.
18 403 v. Fraser, the Court there indicated and I'm quoting
19 here -- sorry, I lost my spot. The Court there indicated
20 that the First Amendment jurisprudence has acknowledged
21 limitations on the otherwise absolute interest of the
22 speaker in reaching an unlimited audience where the speech
23 is sexually explicit and the audience may include
24 children. The Supreme Court there specifically noted in
25 addressing the question whether the First Amendment places

1 any limit on the authority of public schools to remove
2 books from a public school library. All members of the
3 court otherwise sharply divided, acknowledged that the
4 school board has the authority to remove books that are
5 vulgar.

6 THE COURT: And do you want to address at all Ms.
7 Prather's argument that if you were talking about the
8 curriculum, there would be one way to evaluate this? But
9 school libraries are exempt from the control that states
10 have over the curriculum?

11 MS. CELLA: Yes, your Honor.

12 There is case law and let me get that for you.
13 There is case law that the states -- and this is in
14 Wisconsin vs. Yoder that the states have the high
15 responsibility for the education of their citizens and
16 education is the apex function of a state.

17 To say that the school libraries cannot
18 reasonably restrict or that the state can't come up with
19 guidelines or restrictions in a public school library
20 because it's not curriculum, that's just not the case.
21 The Supreme Court has told us so and there is a difference
22 between curriculum, but that doesn't mean that there's no
23 -- that the state doesn't have a right or the schools
24 don't have a right to reasonably restrict what comes into
25 their libraries for instructional material or, you know,

10:23:42 1 library books. They can -- any educational policy that
10:23:49 2 the state has the responsibility for that, it can be
10:23:51 3 regulated on a state level.

10:23:55 4 THE COURT: Okay. Anything else you want to say
10:23:56 5 on sovereign immunity?

10:23:58 6 MS. CELLA: I think we talked about almost
10:24:01 7 everything. Let me just look at my notes real quick if
10:24:04 8 you don't mind. I think that's it on sovereign immunity,
10:24:16 9 your Honor.

10:24:16 10 THE COURT: Okay. Anything else for plaintiff?
10:24:51 11 And I may -- I don't want to blame you for something that
10:24:55 12 I'm saying. I think your argument with regard to Ex
10:24:59 13 Parte: Young is under the First Amendment, right? It's
10:25:01 14 not the violation under a federal statute?

10:25:04 15 MS. PRATHER: That's correct, your Honor.

10:25:05 16 THE COURT: Okay.

10:25:06 17 MS. PRATHER: And, your Honor, the case that was
10:25:08 18 -- cases that were decided by the defendant are highly
10:25:12 19 distinguishable and this kind of goes into the fact that
10:25:14 20 we're not dealing with student speech here. Talk about
10:25:19 21 the public school library and, in fact, this is not even
10:25:23 22 in the public school library setting. This is booksellers
10:25:27 23 who sell books well beyond the public school libraries
10:25:31 24 being forced to rate books based upon the parameters set
10:25:34 25 forth by TEA.

1 The Hazelwood case and the Bethel case were both
2 cases that dealt with student speech or speech in a
3 school-sponsored setting. That's not what you have here.
4 Library books shouldn't be analyzed through this sort of
5 analysis, and they've been expressly prohibited from being
6 analyzed through this analysis under U.S. vs. American
7 Library Associations because librarians, they don't
8 collect books to provide a public forum for authors to
9 speak. They do so to facilitate research, learning,
10 recreational pursuits.

11 And that's why the Court -- the Supreme Court in
12 Pico and the Fifth Circuit in Campbell vs. St. Tammany
13 Parish School Board support the finding that school
14 libraries are a designated public forum for the receipt of
15 information. And so, content-based restrictions cannot be
16 imposed upon -- unless -- cannot be imposed unless the
17 government meets the strict scrutiny analysis.

18 So here, it's apples and oranges, they're trying
19 to lull this court into believing this is student speech.
20 It's not student speech. There's no applicable forum
21 analysis that needs to be applied in this setting;
22 instead, we're talking about speech. The speech at issue
23 being speech that occurs involving the right to distribute
24 and sell books and the right to be free from compelled
25 speech.

1 Your Honor, another one of the red herrings that
2 has been brought up in this case is that this might be
3 considered commercial speech. That, too, is absolutely
4 off point. Commercial speech is speech that proposes a
5 commercial transaction. You don't lose the First
6 Amendment protections by selling books. That is not
7 something that makes or transforms books into commercial
8 speech. That would be like saying if you put a book in
9 the school -- if you put a book in the window of a
10 bookstore, all of a sudden, it's no longer protected by
11 the First Amendment. It's commercial speech and that's
12 simply not the law.

13 Here, you've got books, you've got newspapers,
14 you've got magazines. Even though they're sold for a
15 profit, that does not prevent them from being a form of
16 expression that is protected by the First Amendment.

17 Finally, the last red herring that we believe the
18 defendants have brought up in their motion to dismiss
19 involves whether or not this is an essential operation of
20 government and that is actually an extremely narrow
21 concept. It applies when you're talking about citizens
22 that are providing factual or demographic information for
23 things like taxes or censuses, and they're not being asked
24 to disseminate a public message with which they disagree.

25 Here, we are being asked to disseminate a public

10:28:55 1 message with which we disagree. So it does not fall
10:28:59 2 within the very, very, very narrow confines of an
10:29:03 3 essential operation of government. Now, at this point,
10:29:06 4 your Honor, I would be prepared to move on to the motion
10:29:10 5 for preliminary injunction, but I'll step back if you have
10:29:14 6 questions.

10:29:14 7 THE COURT: No. Go ahead, please.

10:29:15 8 MS. PRATHER: Okay.

10:29:18 9 MS. CELLA: Your Honor, we would object to going
10:29:20 10 on to the motion for preliminary injunction without a
10:29:22 11 ruling on the motion to dismiss because of the
10:29:24 12 jurisdictional issues we've raised.

10:29:25 13 THE COURT: Okay. I understand.

10:29:28 14 You may proceed.

10:29:29 15 MS. PRATHER: Thank you, your Honor.

10:29:32 16 So, your Honor, the plaintiffs are entitled to a
10:29:38 17 preliminary injunction if they can establish a substantial
10:29:40 18 likelihood of success on the merits that they have
10:29:45 19 suffered, that there is a substantial threat of
10:29:47 20 irreparable harm if the injunction is not granted, and
10:29:50 21 that the injury outweighs any harm that the injunction
10:29:53 22 might cause to the defendant and will not disserve the
10:29:58 23 public interest.

10:29:59 24 Here, we've got six different ways in which H.B.
10:30:06 25 900 violates the Constitution. We've got the fact that it

10:30:09 1 compels speech in violation of 303 Creative because it
10:30:13 2 forces booksellers to express government views with which
10:30:17 3 they disagree. We've got a problem of unconstitutional
10:30:21 4 vagueness because it fails to provide clear standards for
10:30:25 5 rating the books. We've got a problem that it is a prior
10:30:29 6 restraint. It actually functions in a manner in which the
10:30:33 7 state has exclusive control over what books are allowed in
10:30:38 8 public schools without any judicial review. We have the
10:30:43 9 fact that it fails the strict scrutiny test. It is a
10:30:47 10 content-based restriction that is not narrowly tailored to
10:30:51 11 serve a compelling governmental interest and we've got the
10:30:54 12 fact that it is overbroad. It prohibits the distribution
10:30:58 13 of constitutionally protected speech and we'll go through
10:31:03 14 each one of these.

10:31:04 15 The unconstitutional compelled speech, we've
10:31:08 16 talked about a bit already, but basically it forces the
10:31:14 17 booksellers to enter into a Hobson's choice, both of which
10:31:18 18 cause injury. They can either adopt the state's rating
10:31:21 19 system and subsequently, their alternative ratings if
10:31:27 20 there's disagreement, or they can follow their own
10:31:30 21 sincerely held beliefs which may or may not align with the
10:31:34 22 state's parameters. But if they refuse to adopt the
10:31:38 23 state's mandated ratings, then they will be permanently
10:31:41 24 banned from selling books to Texas schools.

10:31:49 25 The book ban compels speech in two different

1 ways. It does so both because it requires the initial
2 rating and it does so because it requires the booksellers
3 to conform with the government's ratings with which they
4 disagree. Our clients have made it very clear in their
5 declarations, they don't agree with this. They don't want
6 to be forced to provide as though they are their own
7 ratings, the state's ratings. They don't want to be the
8 mouthpiece for the state.

9 In your notebook, your Honor, there's a whole
10 section of declarations about this. It's behind tab 4 and
11 the problem here is, we do run afoul directly of the 303
12 Creative decision because you're forcing the booksellers
13 to adopt the state's preferred message against their own
14 conscience in violation of the First Amendment.

15 The second ground upon which we believe that the
16 statute is unconstitutional -- your Honor, you only need
17 to find one of these. So we've given you five, actually,
18 six in our briefing because we also talk about the
19 delegation doctrine in there. But you just need to find
20 one of these is applicable.

21 So second is the book ban is unconstitutionally
22 vague. The way that it's set forth, it actually fails to
23 provide the reviewer, which is now the bookseller, a
24 reasonable opportunity to know what conduct is prohibited
25 and it exudes the ability to have indefinite, arbitrary

1 and discriminatory applications. That is a problem under
2 the Constitution. It's similar to the drone law which
3 Judge Pitman held was unconstitutionally vague. And when
4 you look at just a sampling of the areas in which the
5 vagueness is present, there are a couple here that we've
6 gone over briefly. It requires that you have to determine
7 what is related to the curriculum. There's no guidance on
8 what is related to the curriculum in the statute.

9 I can tell you, for instance, my kids, their
10 third-grade teacher, she was phenomenal, she has books
11 wall to ceiling all over her library in her room and they
12 didn't -- when they were assigned to do reading, they were
13 not assigned to read a particular book. They were
14 assigned to a genre and then, they went to a shelf and
15 they picked a book from the poetry section, a book from
16 the historical fiction section, a book from the biography
17 section. Whether or not those books were, quote, unquote,
18 directly related to the curriculum, who knows, it wasn't a
19 specific title that was being assigned. But those
20 curriculum vary. They vary from day to day. They vary
21 from year to year. They vary from district to district
22 and they're constantly being reevaluated.

23 So again, if you look at the declarations, these
24 will be behind tab 5, the vendors talk about how they
25 don't know how to make this determination. A second

1 problem is with these definitions of sexually relevant and
2 sexually explicit and the contextual analysis that is
3 involved and we'll get into this in a little more detail
4 next. And then, the last one -- and these are just a
5 sampling of the basis upon which we believe that the
6 statute is unconstitutionally vague -- is there's no
7 guidance for what happens if a book has to be recalled.
8 It requires the vendor to recall books, but it doesn't say
9 what happens then. Do they have to issue a refund? How
10 do they go about recalling it? It's very, very unclear
11 and it similarly doesn't provide any guidance as to
12 whether or not a book is in active use.

13 And so, we talked a little bit last time about
14 kind of the Frankenstein definitions, the cut-and-paste
15 portions of the penal code and the undefined terms from
16 case law that have made its way into this statute and that
17 the fact that the statute does not track the definition of
18 obscenity and so, it doesn't pass constitutional muster.
19 But let's look at the definition of sexually relevant, for
20 instance.

21 So here, if you look at this, the statute applies
22 to library material. The first thing you have to do is,
23 you have to determine if it is directly related to
24 curriculum. No explanation as to what that means. Then
25 you have to determine if it's in active use. Again, no

1 explanation but that's what you have to do and that's what
2 has to be done by September 1st. You have to rate
3 everything that was previously sold that's in active use.

4 Then you look at the passage -- and by the way,
5 it's not just the book. It's every passage in the book to
6 determine whether or not it is sexually relevant, and that
7 depends on whether or not it describes, depicts, or
8 portrays sexual conduct. Then you look at the definition
9 of sexual conduct and it seemingly encompasses all books
10 that mention any sexually related topic.

11 It asks for the reviewer to determine the intent
12 of the author, which is an impossible task because when
13 you look under sexual contact, it talks about the intent
14 to arouse or gratify. So they have to determine the
15 intent of the author and it asks for them to determine
16 whether or not this is a lewd exhibition. And lewd
17 exhibition is not a defined term in the penal code. None
18 of this, none of this is evaluated through the lens of
19 different age groups either. So there's no distinction
20 that's being made between what's appropriate for a young
21 adult reader versus what is suitable for a first-grade
22 reader.

23 Then we move on to sexually explicit and the
24 reason I say we move on is because you have to satisfy the
25 definition of sexually relevant before you get to the

1 definition of sexually explicit. So now you're looking at
2 what you've already deemed to be a sexually relevant
3 passage. Again, not book. Passage. Each passage in the
4 book has to be reviewed. And then, you have to look at
5 whether or not it qualifies as sexually explicit.

6 So here, you're considering community standards.
7 Well, there's absolutely no definition of community
8 standards at all. There is different communities in the
9 state of Texas, Austin, Big Spring, different community
10 standards. There's no distinction for the age of the
11 reader. And then, you embark upon this multi-tier
12 analysis without any consideration of the social or
13 literary value of the work.

14 So this again runs afoul of the Constitution.
15 You wonder under sexually relevant, under sexually
16 explicit, whether or not the undefined lewd exhibition,
17 you know, has books like Captain Underpants and things
18 like that, or books with a Carpaccio painting in it,
19 whether those fall within the definition. And it's hard
20 to tell without there being some sort of parameter for in
21 the case of Carpaccio, social or literary value.

22 So I think one thing that I was wanting to do
23 today that will help to be able to put this in context and
24 today is my kid's birthday so I brought party favors. I
25 brought a book to the Court and I have a copy for opposing

10:40:11 1 counsel and this book is what many would call one of the
10:40:17 2 preeminent books in Texas literature. It's Lonesome Dove.
10:40:24 3 So I'm handing the Court both the book and a breakdown of
10:40:30 4 what has to be done.

10:40:31 5 THE COURT: Are you actually giving me a copy of
10:40:34 6 the book?

10:40:35 7 MS. PRATHER: I've got a copy of the book. Happy
10:40:38 8 birthday.

10:40:38 9 THE COURT: It's my favorite book.

10:40:40 10 MS. PRATHER: There we go.

10:40:43 11 THE COURT: I may have to report this on my...

10:40:51 12 MS. PRATHER: So like I said, your Honor, today's
10:40:53 13 my kid's birthday, everybody gets a party favor. And what
10:40:57 14 we've got is a copy of Lonesome Dove and if you turn to
10:41:02 15 page 200 and you look at the passage there and you do that
10:41:10 16 alongside this worksheet, this two-page, front-and-back
10:41:15 17 worksheet, which is the valuation that has to be done for
10:41:19 18 every passage of every book that might fall within the
10:41:21 19 parameters of H.B. 900.

10:41:23 20 So I'm looking at it right now and the first
10:41:27 21 thing that I have to determine is whether or not this
10:41:32 22 falls within the curriculum. And I don't know the answer
10:41:35 23 to that question and that's part of the issue here, right,
10:41:39 24 is that this definition or this statute is going to impact
10:41:45 25 a number of different books that are not part of the

1 curriculum but that are contained in libraries and that
2 may be considered classics.

3 So when I look at this passage, let's just assume
4 that it's not part of the curriculum and then, we have to
5 decide whether or not it's in active use. Again, no clue,
6 no way to determine that. But if we assume that it's in
7 active use, then we move down the parameters and we
8 determine whether or not it's sexually relevant. So
9 sexually relevant material has to describe, depict, or
10 portray sexual conduct. And then, there's a definition of
11 sexual conduct that includes that undefined term "lewd
12 exhibition."

13 Sexual contact is also part of the definition and
14 that includes touching certain body parts. Now, when I
15 read this, the only body part that is listed here is
16 Lorie's back. It says Lorie let him rub her back. Now,
17 that's not listed in here as one of these sort of
18 off-limits body parts, so I'm not quite sure what to do
19 with that. And then, it doesn't actually say that they
20 have sex. It just says that Jake got tired of the back
21 rub and tried to roll her over for another poke. Now, I
22 don't know, your definition of poke might be different
23 than my definition of poke, but it doesn't specifically
24 describe excretory organs or the act of having sex.

25 It also mentions that she pushed his carrot away.

1 Again, not specifically describing a body part, don't know
2 if it falls within this definition or not. And it
3 mentions that he made a second try and she pushed him
4 away. So don't know if it qualifies as repetitive or not
5 under the statute. But you get to the end of this and
6 your rating might be different than my rating. I might
7 say, well, I think that it's sexually relevant because it
8 seems to be implying some sort of sexual conduct. And you
9 might say it's sexually explicit because it actually has
10 this, you know, repetitive context to it, it's graphic in
11 detail, et cetera.

12 What happens then? If you say it's sexually
13 explicit and I say it's sexually relevant, does that mean
14 that the school district can purchase this book from me
15 because I said it was sexually relevant and not from you
16 because you said it was sexually explicit? This is one of
17 the problems. This is one of the problems with the vague
18 definitions at issue in this case.

19 The other problems, and some of them the Court
20 flagged at the last hearing, involve the operation of the
21 statute itself. So it's not just the ability to apply the
22 definitions within the statute, but it's also what books
23 have to be rated, what happens if the vendor no longer
24 carries the books, when do these ratings have to be
25 complete? That's been a big topic of discussion today.

10:45:20 1 Can the vendor sell books in the interim? What are the
10:45:24 2 penalties for noncompliance? What if those books are
10:45:28 3 rated -- are donated?

10:45:29 4 That was one thing my kids, their third-grade
10:45:32 5 teacher had this wall-to-ceiling books, a lot them, she
10:45:36 6 said, were donated. She got them at garage sales. Who
10:45:38 7 rates those books? What happens if two vendors have
10:45:40 8 different ratings? What is the --

10:45:43 9 THE COURT: I know it cuts both ways. I think I
10:45:47 10 said this last time, but to me, the vagueness in the
10:45:54 11 penalties for noncompliance, I'm not sure what to do with
10:45:58 12 that because I don't think -- the only penalty you all
10:46:05 13 have for noncompliance, the only penalty against plaintiff
10:46:09 14 is that you would not be able to sell books to the school
10:46:17 15 district. But even that -- my concern about that being
10:46:24 16 considered a penalty is that the school districts always
10:46:27 17 have that power to decide.

10:46:31 18 So maybe you could help me on that issue.

10:46:37 19 MS. PRATHER: Your Honor, if the state just
10:46:38 20 wanted to rate the books themselves and then say, school
10:46:41 21 districts, you can only purchase books based on what we
10:46:44 22 say here, that will be one thing. That's not this law.
10:46:48 23 That's the problem. That's not this law. This law,
10:46:52 24 instead, requires my clients and other book vendors
10:46:56 25 throughout the state of Texas to embark upon this two-page

10:47:01 1 analysis, front and back for every passage of every book
10:47:04 2 they've ever sold to any Texas school. That's the problem
10:47:11 3 and it's hard to do.

10:47:12 4 You looked at the two pages, it's not a clear-cut
10:47:17 5 -- as required by the Constitution, it is not a clear-cut
10:47:23 6 way of being able to implement the law. It is fraught
10:47:29 7 with peril because there will be tremendous disparity.
10:47:31 8 The vagaries make it unconstitutional.

10:47:34 9 THE COURT: Let me give you two homework
10:47:38 10 assignments that will help us. One is, any cases that you
10:47:44 11 could cite to us where there was standing found based on
10:47:50 12 the compliance of the law. I mean, it seems to me, this
10:47:53 13 has been fought about probably in the EPA context but, I
10:47:59 14 mean, where -- your argument is -- I get -- I'm not
10:48:03 15 ignoring your -- for the moment, I am ignoring the
10:48:07 16 argument that there is a constitutional issue. I get
10:48:09 17 that. I'm not -- but it seems to me, another compelling
10:48:13 18 argument that you are making is that the cost of
10:48:18 19 compliance is so prohibitive that it would injure your
10:48:22 20 client. That's part of your preliminary injunction issue
10:48:26 21 and if you could -- if you get us cases that deal directly
10:48:31 22 where someone has obtained an injunction by arguing that
10:48:35 23 the cost of compliance with a law was something I could
10:48:42 24 consider, that would be good.

10:48:45 25 MS. PRATHER: Your Honor, yes, the mifepristone

10:48:49 1 case that was handed down two weeks ago from the Fifth
10:48:51 2 Circuit is on point in that regard, but I'll be happy to
10:48:54 3 get you more. But that was handed down on August 16th.

10:48:57 4 THE COURT: Okay.

10:49:01 5 MS. PRATHER: Your Honor, another way in which
10:49:03 6 this law is unconstitutional -- this is the third. We've
10:49:06 7 talked about compelled speech, we've talked about
10:49:09 8 unconstitutional vagueness. It's also an unconstitutional
10:49:12 9 prior restraint and that's because it prevents the
10:49:15 10 distribution of constitutionally protected works without
10:49:18 11 judicial review. So remember this goes beyond the
10:49:22 12 definition of obscenity and under Reno vs. ACLU, that is a
10:49:28 13 problem. Sexual expression, which is indecent but not
10:49:32 14 obscene, is protected by the First Amendment.

10:49:34 15 And here, we've got a book ban that provides the
10:49:38 16 government with complete discretion and that complete
10:49:42 17 discretion has no due process or the ability to challenge
10:49:47 18 the government's final determination of constitutionally
10:49:50 19 protected works and what happens. This is what happens to
10:49:54 20 them. This prohibition of distributing literature is a
10:49:58 21 classic form of a prior restraint.

10:50:01 22 It's something that the U.S. Supreme Court dealt
10:50:03 23 with in the Bantam Books case and there, they struck down
10:50:07 24 a Rhode Island law that established a commission similar
10:50:10 25 to the TEA to review and rate books as objectionable for

1 sale, or distribution, or display to use under 18 years of
2 age. The justices held in that case that this was an
3 unconstitutional system of a prior restraint because it
4 suppressed the distribution of non-obscene,
5 constitutionally protected works without a judicial
6 determination that the content could be lawfully banned.

7 This concept of prior restraints being a severe
8 impingement on the First Amendment is not a new one. It's
9 one that Thomas Jefferson talked about early on in the
10 days of America. It's one that the U.S. Supreme Court and
11 the Fifth Circuit have opined about over and over. In the
12 Chiu vs. Plano ISD case, they talked about the fact that
13 the prohibition distributing literature is a classic form
14 of a prior restraint.

15 The fourth ground upon which the law is
16 unconstitutional is because it's a content-based
17 regulation, which is presumptively unconstitutional, and
18 it's not narrowly tailored to meet the state's compelling
19 interest. So here, you've got this content-based
20 restriction. It's content-based because it's requiring
21 them to determine whether it's sexually explicit or
22 sexually relevant; and it's not narrowly tailored because
23 it's reaching constitutionally protected works. It's
24 reaching works outside the bounds of obscenity. It also
25 does not distinguish the age of the reader, which is

1 significant. It's not the least restrictive way to go
2 about this.

3 Here you are, you're banning the distribution of
4 constitutionally protected works, you're not considering
5 their literary artistic value, you're not considering the
6 age of the reader, and you're asking booksellers to rate
7 every book that they've ever sold to a public school,
8 which means reviewing every word of every work, including
9 books that they no longer sell or maintain in their
10 inventory.

11 It's also important to note that some of these
12 booksellers like BookPeople and Blue Willow, they
13 participate in festivals. BookPeople is one of the
14 sponsors of the Texas Book Festival started by former
15 First Lady Laura Bush. They don't know where those books
16 go. They sell those books at these festivals, they don't
17 know where they go. How do they know if they are in a
18 school library, in active use, not part of the curriculum
19 where they're even subjected to this law? They simply
20 don't know.

21 You asked earlier about costs involved and one of
22 the declarations, again, I referred you to the Blue Willow
23 declaration. In that declaration, which is in your
24 notebook behind the declarations tab, she says that the
25 total cost to review books already sold -- and this is not

1 future books, this is just already sold -- would be
2 between 4 million and \$500 million. That would put this
3 business -- this bookstore out of business. Their annual
4 sales are just over a million dollars per year.

5 Finally, the statute is unconstitutionally
6 overbroad. We talked about the fact that it is not
7 limited to the Miller v. California obscenity declaration.
8 That is fatal. That alone is fatal to this lawsuit
9 because it reaches constitutionally protected work. We
10 talked about the fact that by not doing that, it doesn't
11 consider whether or not the book taken as a whole lacks
12 serious literary, artistic, political, or scientific
13 value.

14 And so then, you end up in a situation where you
15 have classics like the ones that are on the screen now
16 that may not be part of the curriculum, but they could be
17 banned because of this lack of consideration for their
18 artistic value. Books like Romeo And Juliet, Catcher In
19 The Rye, Gone With The Wind, Color Purple, these are
20 Pulitzer Prize-winning books. Books that the screen
21 version has won academy awards. These books, Twelfth
22 Night and others, would be subject to being banned because
23 if they're not part of the curriculum, they would fall
24 within the parameters potentially of sexually relevant or
25 sexually explicit works.

1 So kind of a modern-day example of the impact of
2 this, if you look at Judy Blume's books, Judy Blume has
3 books for all ages. She has books for five-year-olds, a
4 book like Freckle Juice where the kid desperately wants to
5 have freckles. A book like Double Fudge, which is
6 appropriate for five to seven-years-olds where the kid in
7 that book is obsessed with money and he embarrasses his
8 12-year-old brother Peter. Then you've got books that are
9 more appropriate for middle-school children like Are You
10 There God? It's Me, Margaret, which talks about sort of
11 the frustration with the differing rates of going through
12 puberty.

13 And then, you talk about a book that's more
14 appropriate for high school and high school seniors,
15 specifically, the book's name is Forever. When Judy Blume
16 was asked why she wrote this book, she said because her
17 daughter asked her to write a book about consenting adults
18 having sex where the girl doesn't die. And why did she
19 ask that? Because every book she had ever read, if the
20 girl got pregnant, she got shipped off to the distant
21 relatives, she got sent to a convent, or she has an
22 abortion and she died. What Forever is about is two
23 seniors in high school who fall in love who decide to have
24 sex for the first time. They have it responsibly and
25 protected and then, they realize months later, as they

1 both move on and are in different places, that life goes
2 on. Books like that are appropriate for high school
3 seniors, but they're not appropriate for the first
4 graders. And so, by not having any sort of consideration
5 of age in this statute, you literally end up having the
6 lowest common denominator of books in our school
7 libraries. It's a race to the bottom. Basically we are
8 in a world of Freckle Juice and Double Fudge and nothing
9 else.

10 So the unconstitutional overbreadth is
11 significant and it's significant because it closes off
12 access for students to be able to get information. And I
13 know that the AG had mentioned that this was not something
14 that we had claimed in our complaint and I've got it up on
15 the screen. All of the various places where we did bring
16 this up in our complaint and we did bring it up --

17 THE COURT: You're fine.

18 MS. PRATHER: In our preliminary injunction
19 motion.

20 Finally, your Honor, we've established that the
21 statute is unconstitutional in a myriad of ways. Now, you
22 look at whether or not it -- it results in irreparable
23 harm and here, the fact of the matter is that unless the
24 book ban is enjoined, plaintiffs will suffer irreparable
25 harm. They will do so because their constitutional rights

1 will be violated.

2 We've got here two cases on the screen, one Elrod
3 vs. Burns talking about the loss of First Amendment rights
4 alone, even for a minimal period, constituting irreparable
5 injury. We've got the Opulent Life Church case, which is
6 in your notebook under tab 8, talking about when there is
7 an alleged deprivation of constitutional rights, courts
8 hold that no further showing of irreparable injury is
9 necessary.

10 And then, finally, the last two factors are
11 balancing of equities and to the public interest. Here,
12 you've got both of those weighing heavily in favor of
13 enjoining the book ban because First Amendment rights of
14 the plaintiffs and other Texans will be infringed if a
15 preliminary injunction is not granted. Injunctions
16 protecting the First Amendment reasons are always
17 considered in the public interest. That is according to
18 Opulent Life, again, in your notebook, tab 8, and in this
19 instance, we do not have the defendants or the public
20 having a legitimate interest in the enforcement of an
21 unconstitutional law.

22 If De Leon vs. Perry, the Western District,
23 affirmed by the Fifth Circuit, stated very clearly there
24 is no harm for issuing a preliminary injunction that
25 prevents the enforcement of a likely unconstitutional

10:59:11 1 statute. That's what we have here, your Honor. The First
10:59:19 2 Amendment embraces the right to be free from compelled
10:59:21 3 speech. It embraces the right to distribute literature
10:59:26 4 and it necessarily protects the rights to receive
10:59:30 5 information.

10:59:31 6 H.B. 900 violates the Constitution in innumerable
10:59:36 7 ways. It should be enjoined before it takes effect on
10:59:39 8 September 1st. Does your Honor have any questions?

10:59:44 9 THE COURT: I don't.

10:59:50 10 Anything else? A response?

10:59:56 11 MS. CELLA: Yes, your Honor. Sorry.

11:00:04 12 The first thing I wanted to point out, your
11:00:12 13 Honor, is plaintiffs continually say that this is not
11:00:17 14 looked at -- the books are not to be looked at in any sort
11:00:20 15 of context. But 35.002(1)(d) talks about that a library
11:00:28 16 material vendor must consider the full context. So I just
11:00:32 17 want to point that out, this is a contextual analysis.
11:00:36 18 It's not just one paragraph in a book.

11:00:39 19 I want to also briefly go over the points
11:00:43 20 plaintiffs just made. I did talk about a lot of this in
11:00:46 21 length last time. It is fully briefed in our submissions
11:00:50 22 but I want to point out a couple things. On the compelled
11:00:54 23 speech aspect of this, this is just simply not compelled
11:00:57 24 speech. This is government speech. We talked about that.
11:01:02 25 The ratings are going to go on TEA's website. This is

11:01:06 1 strictly government speech. Any rating should not be
11:01:10 2 attributed to the plaintiffs.

11:01:13 3 THE COURT: Well -- and I beat up the other side
11:01:17 4 on part of this. Ultimately, I think that's correct. But
11:01:26 5 what you're asking the plaintiff to do is go through and
11:01:31 6 take Lonesome Dove and give it a rating. In fact, I
11:01:39 7 closed it but the part where it says they're required to
11:01:51 8 perform a contextual analysis of each book and rate it and
11:01:55 9 so -- and those ratings will be posted. I get that they
11:02:01 10 would be on the TEA website, but they would be there under
11:02:09 11 Barnes & Noble, or whoever, and they actually would be
11:02:16 12 Barnes & Noble's unless they were changed, right?

11:02:20 13 MS. CELLA: No. They would still be TEA's.
11:02:24 14 They'd still be the government's. The government has
11:02:25 15 ultimate oversight.

11:02:26 16 THE COURT: Well then, why are you -- why does
11:02:29 17 the TEA just have a -- I would be more willing to believe
11:02:32 18 that if the TEA just had a, you know, here's the TEA's
11:02:39 19 website without giving reference to who did the ranking.
11:02:48 20 That's one of the argument -- I think I'm summarizing.
11:02:52 21 Ms. Prather can jump up if I'm wrong, but I think she's
11:02:55 22 saying that as of September 1st, her clients have to
11:03:04 23 perform what I just said, a contextual analysis of every
11:03:08 24 book and rate it, and one of her problems with that is
11:03:15 25 that she feels like the method to rate it by is

11:03:22 1 inappropriate. For example, it's unclear what sexually
11:03:27 2 explicit is with regard to community norms and other
11:03:30 3 issues.

11:03:32 4 But let's say that she didn't even have that
11:03:35 5 argument. Let's say she thought that the law was fine in
11:03:40 6 terms of making it so that her client could actually
11:03:44 7 perform this contextual analysis and feel comfortable that
11:03:49 8 what they were -- the label -- I'm sorry, the rating they
11:03:53 9 were giving it was an accurate one and they don't concede
11:03:58 10 that but, let's say, for my question, they do, that's
11:04:01 11 going to be -- that list -- even if it's put on the TEA
11:04:04 12 website, that's going to -- until there is some analysis,
11:04:09 13 that's going to be their analysis of what their rating
11:04:15 14 ought to be, and their rating of no rating, or sexually
11:04:19 15 explicit, or whatever it is, is speech that you are making
11:04:22 16 them do.

11:04:24 17 MS. CELLA: Well, a couple of things. First,
11:04:28 18 they don't have to do it. They want to make a lot
11:04:31 19 about --

11:04:31 20 THE COURT: I get that. I get that argument and
11:04:34 21 I'm sorry. I fully understand they can say no, we're not
11:04:39 22 going to do this. We're not going to be in this market.
11:04:43 23 Now, that's a different argument because -- and Ms.
11:04:45 24 Prather would argue that's not okay but I get that. I get
11:04:50 25 that argument.

11:04:51 1 And so, let's assume for the moment, if I have to
11:04:55 2 figure out -- if I do have to figure out that it's not
11:05:01 3 enough that they don't have to do it because they don't
11:05:03 4 have to sell to the school districts, what are your other
11:05:08 5 arguments?

11:05:09 6 MS. CELLA: So TEA is asking for this information
11:05:14 7 for them to be able to sell books. We've established
11:05:17 8 that. But the fact that it's going to go on TEA's website
11:05:20 9 and TEA has final say makes that TEA's speech. It's not
11:05:25 10 -- it shouldn't be attributed to the vendors or to the
11:05:28 11 publishers. This is speech that --

11:05:30 12 THE COURT: Then why is it identified by the
11:05:32 13 distributors and the vendors? Why are they on it?

11:05:38 14 MS. CELLA: Well, the list is what would be
11:05:40 15 posted. Is that what you're -- I want to make sure I
11:05:42 16 understand your question. Is that what you're asking me?

11:05:44 17 THE COURT: If I understand what's going to
11:05:47 18 happen and I might not be accurate, they're going to give
11:05:54 19 you by April 1st, this set of ratings and then, the TEA is
11:06:03 20 going to post them, but they're going to post them and
11:06:08 21 identify that these are Barnes & Noble, et cetera,
11:06:14 22 ratings. And so, I'm asking why the TEA has to attribute
11:06:19 23 the ratings to anyone.

11:06:20 24 MS. CELLA: Okay. I understand. The reason for
11:06:21 25 that is so the school districts know if they can purchase

11:06:24 1 from those vendors. There would be no other way for the
11:06:29 2 school district to know who they can purchase from. They
11:06:32 3 can only purchase books or any of these materials from
11:06:38 4 vendors that submit these lists.

11:06:40 5 THE COURT: And I may be finally connecting this
11:06:44 6 and you keep looking at me. I think so -- the point of
11:06:53 7 this is so if Austin Independent School District, where
11:06:58 8 we're sitting, wants to know whether or not they could buy
11:07:00 9 from Barnes & Noble, not only does Barnes & Noble have to
11:07:04 10 have complied or people -- BookPeople, whatever, not only
11:07:09 11 do they have to have complied with the lists but the
11:07:12 12 school district then uses that list of the ratings to know
11:07:16 13 what books they could buy and how to treat the books.

11:07:19 14 MS. CELLA: Correct.

11:07:20 15 THE COURT: And so, if they're buying them from
11:07:22 16 the plaintiffs or others, they could -- whatever Lonesome
11:07:29 17 Dove gets rated, because it has the word "poke" in it,
11:07:33 18 whatever it gets rated, because it's on that list, Austin
11:07:37 19 Independent School District can say okay, we can buy this
11:07:42 20 and put it in the main library because it has no rating,
11:07:46 21 we can buy it and put it in the parental consent part, or
11:07:54 22 we can't buy it.

11:07:55 23 MS. CELLA: Correct.

11:07:56 24 THE COURT: And so, the purpose of doing this is
11:07:58 25 so that the school district knows what it can and cannot

11:08:02 1 purchase.

11:08:02 2 MS. CELLA: Correct. And that's why TEA has that
11:08:05 3 oversight that they have.

11:08:07 4 THE COURT: And so, while we've been talking a
11:08:10 5 lot about First Amendment -- I've been kind of stuck on
11:08:13 6 the First Amendment aspect of this, but the point of
11:08:16 7 having the TEA having this supervisory ability is if
11:08:22 8 someone from TEA thought, well, Austin's pretty liberal,
11:08:28 9 I'd better look at some of these books, and they went in
11:08:31 10 and determined X book was given no rating and they think
11:08:39 11 it ought to be sexually relevant, or whatever the word is,
11:08:45 12 and so, we're going to change it, even for Barnes & Noble
11:08:50 13 because Barnes & Noble needs to say unless they put this
11:08:55 14 label on it and sell it so that the school library knows
11:09:00 15 how to treat it, then they can't buy that -- the purpose
11:09:04 16 is to help the school decide what they can and can't buy.

11:09:11 17 MS. CELLA: Correct, your Honor.

11:09:12 18 THE COURT: I got it.

11:09:13 19 MS. CELLA: Yes. That's correct. This speech --
11:09:18 20 I'm sorry, this statute is also not vague. As it pertains
11:09:22 21 to plaintiffs, it's actually very clear. They need to
11:09:26 22 rate the books, submit a list to TEA, update that list
11:09:30 23 every year and correct any ratings if TEA finds that it
11:09:35 24 was incorrect. There's no mechanism in the statute that
11:09:42 25 looks at what their analysis consisted of or how they, you

1 know, how they came to their rating. There's also no
2 enforcement against plaintiffs or any other vendors or
3 publishers as we've discussed at length.

4 So as it pertains to plaintiffs, it's actually
5 very, very clear. And then, there's also no penalty for
6 noncompliance. If the plaintiffs don't submit their
7 lists, the schools can't buy books from them; if the
8 schools do, TEA does what it does.

9 THE COURT: The reason for the not being able to
10 buy the books from them is without having the list, the
11 concern is that there's no way to force the libraries to
12 comply with the accessibility of the different books or
13 maybe even in fairness, if the TEA believed that they were
14 sexually explicit, then I don't know what the book would
15 be. But Austin Independent School District might buy a
16 book that the TEA now considers -- from Barnes & Noble, or
17 BookPeople, or whoever, that the TEA considers to be
18 sexually explicit and that's what they're trying to
19 prevent.

20 MS. CELLA: Correct.

21 THE COURT: Now, the question, though, of course,
22 is whether that burden should initially be on the
23 plaintiffs or on the TEA, and your position is that it's
24 okay to have this because the plaintiffs have a choice.
25 They can either sell to the school districts with the

11:11:20 1 restrictions that are their -- the commercial restrictions
11:11:24 2 or they can avoid the expense and just not sell.

11:11:29 3 MS. CELLA: Correct, your Honor.

11:11:30 4 THE COURT: They can sell, for example, to Austin
11:11:33 5 Public Library whatever they want without these ratings.

11:11:37 6 MS. CELLA: Yes.

11:11:37 7 THE COURT: It's only if they want to sell to
11:11:40 8 school districts where the -- could one argue that the
11:11:44 9 state has even given them the first opportunity to
11:11:48 10 determine the ratings so, you know, so they can sell as
11:11:52 11 many books as possible.

11:11:54 12 MS. CELLA: Sure. That's an argument. The
11:11:58 13 reason -- like you said, the reason the lists need to be
11:12:01 14 submitted is because the school districts need to know who
11:12:04 15 they can and cannot purchase from and then, any books off
11:12:07 16 of those lists that they can --

11:12:08 17 THE COURT: Not just who they can. That's where
11:12:11 18 you -- I've been kind of tripped up. I get that they
11:12:14 19 can't buy them from someone who hasn't given them a list.
11:12:17 20 But not only can they buy books from them but which books
11:12:21 21 can they buy and how they need to deal with them.

11:12:24 22 MS. CELLA: Correct. Yes. That's exactly
11:12:26 23 correct.

11:12:28 24 THE COURT: Did you have anything else?

11:12:31 25 MS. CELLA: Just give me one second to look

11:12:33 1 through my notes. The one point I did want to make
11:12:43 2 quickly about the overbreadth and the age limit analysis,
11:12:48 3 that's just simply not relevant to this.

11:12:50 4 THE COURT: I'm sorry.

11:12:51 5 MS. CELLA: The age limit analysis, that's just
11:12:53 6 simply not relevant to plaintiffs. When a school library
11:12:57 7 can determine what books are for what age of students,
11:13:01 8 they just need to rate those books consistent with the
11:13:05 9 statute. That is all I have at this time, your Honor.

11:13:10 10 THE COURT: Okay. Thank you, ma'am.

11:13:14 11 Ms. Prather.

11:13:17 12 MS. PRATHER: Your Honor, with regard to the
11:13:29 13 context and the whether or not they consider the full
11:13:32 14 context when they review the -- each passage of each book,
11:13:37 15 if you look at the provision 35.002(1)(d), it talks about
11:13:42 16 reviewing the full context in which the description or
11:13:46 17 depiction of the conduct appears. It's not talking about
11:13:49 18 the full context of the book as a whole, which is required
11:13:54 19 under Miller. Miller also requires considering the
11:13:57 20 literary and artistic and political value, also not part
11:14:02 21 of the statutory requirements for review.

11:14:05 22 With regard to government speech, if they want
11:14:09 23 this to be government speech, they should have rated the
11:14:12 24 books themselves. Here, the problem is that these ratings
11:14:19 25 go up on the Worldwide Web. They go -- this is not a list

1 that is sent to the Texas public schools. This is a taint
2 that will be put on my clients as rating these books in a
3 way that they do not necessarily agree with. They don't
4 agree with the rating parameters and they may not agree
5 with the corrected ratings, and it's going to taint their
6 abilities beyond the state of Texas because they're going
7 to be attributed as issuing these ratings to these books
8 that will be harmful for them beyond the state. It will
9 be harmful for the book authors beyond the state. It is
10 absolutely not a situation where the government has spent
11 the time and the money to rate these books and those
12 ratings are put up as the government's. They're being put
13 up as the booksellers' and they have harm beyond the state
14 borders.

15 Also, before the rating is, quote, unquote,
16 corrected, if this is solely for the purpose of advising
17 school districts as to whether or not they can purchase
18 books from a particular vendor, what happens if there are
19 different ratings? How does that get resolved? So once
20 again, the school district goes to the website, it looks
21 and it sees that Lonesome Dove is rated differently by you
22 and by me. So they purchase it from me because they can't
23 purchase it from you because there's no corrected rating
24 at that point, that's problematic.

25 With regard to the vagueness argument, we went

11:15:54 1 through a series of why this statute is unconstitutionally
11:15:59 2 vague and that series went through an exercise of actually
11:16:02 3 trying to apply the law. The state came back and just
11:16:06 4 discussed procedure and the fact that the procedure is
11:16:09 5 clear. That is not discussing the inability to rate these
11:16:15 6 books.

11:16:17 7 And finally, with regard to overbreadth, the
11:16:19 8 problem is that the age is not considered in the
11:16:23 9 contextual analysis for the rating, which is problematic.
11:16:28 10 In a case that was handed down last month, the
11:16:31 11 Fayetteville case, which in your notebook at tab 4
11:16:35 12 discusses this exact issue, your Honor. Thank you.

11:16:43 13 THE COURT: Anything else?

11:16:44 14 MS. CELLA: Nothing else, your Honor, unless you
11:16:46 15 have specific questions.

11:16:47 16 THE COURT: I don't think so. Okay. Well, thank
11:16:51 17 you again. I'm sorry you have to have done this in two
11:16:56 18 days, but I thought I was going to be in trial this week
11:16:59 19 and fortunately for me, I'm not with respect to this.
11:17:04 20 Give me one second.

11:17:09 21 Ms. Prather, if you could come back up for a
11:17:11 22 second because you raised something new that I'm not sure
11:17:13 23 I followed. And you said it and I thought I did but I
11:17:28 24 don't think anyone has raised this before but -- actually,
11:17:31 25 sit down for a second. I'm going to start with the

11:17:34 1 government and have them -- tell me what they think
11:17:37 2 they'll have and, then, you could respond. So if you
11:17:39 3 could come back up for a second.

11:17:53 4 It wasn't until Ms. Prather just mentioned this,
11:17:55 5 but so, let's say that Barnes & Noble ranks Lonesome Dove
11:18:09 6 no rating and BookPeople ranks it something different,
11:18:18 7 whatever, doesn't matter, what happens then?

11:18:23 8 MS. CELLA: So any of that is not an issue for
11:18:28 9 plaintiff. That is a TEA issue. They can review those
11:18:31 10 ratings and correct any rating that they need to correct.
11:18:35 11 Well, have the vendor correct the rating.

11:18:37 12 THE COURT: Well, I can see your point, on one
11:18:42 13 hand, that it may or may not. But yeah, I get it, they
11:18:49 14 give the rankings and they are what they are. But in
11:18:52 15 terms of -- so in that situation, here's the reason I
11:18:59 16 care. I think Ms. Prather's made it pretty clear that she
11:19:03 17 thinks that the TEA ought to be doing this and not the
11:19:06 18 folks that publish books or sell books. And if the TEA
11:19:11 19 were to do that, if they had taken this burden on, well,
11:19:15 20 whatever they ranked Lonesome Dove, that's what it would
11:19:19 21 be, the school districts could decide okay, we can buy it
11:19:24 22 and put it on the shelves. We can buy it and wrap it in
11:19:27 23 brown paper bag and hide it somewhere until the parents
11:19:32 24 say it's okay. Or maybe we don't get to see it at all.

11:19:36 25 But isn't that another issue with the statute

11:19:41 1 that you're going to have really -- what happens when you
11:19:53 2 have 2,000 books that have different ratings when
11:20:01 3 publishers turn them in and they're -- how does that help
11:20:03 4 the school districts?

11:20:05 5 MS. CELLA: Well, ultimately, your Honor, that
11:20:08 6 discrepancy would be up to TEA because they have the
11:20:11 7 oversight. The school districts.

11:20:12 8 THE COURT: How are they going to deal with it?
11:20:14 9 How does the statute indicate they're going to deal with
11:20:16 10 the fact that there could be thousands of books that have
11:20:19 11 different ratings, depending on -- you know, in terms of
11:20:30 12 kind of like prior restraint on this. And again, maybe
11:20:33 13 the plaintiff doesn't have the standing to raise this
11:20:35 14 themselves. But, you know, what happens when there are
11:20:41 15 thousands of books that have different ratings? And
11:20:46 16 there's a year window there and there's not really, even
11:20:50 17 you admitted. If I'm wrong, I think you admitted that the
11:20:53 18 TEA doesn't have to do anything. I mean, TEA can do it
11:20:57 19 but they don't have to. What happens then?

11:21:02 20 MS. CELLA: Well, your Honor, the plaintiffs
11:21:05 21 don't have the standing to raise that issue. That is a
11:21:07 22 TEA issue. There's just no -- it's a TEA --

11:21:16 23 THE COURT: Well, see if I can phrase this the
11:21:18 24 right way. It may not -- it seems to me, I'm just
11:21:21 25 thinking out loud. It seems to me that it may not impact

1 Barnes & Noble, individually, in the sense they turn in
2 their list and it's the list. But as a group, it seems to
3 me to be a problem because, again, of the vagueness issue
4 of knowing how to rate these things and if as a group,
5 there are all these different, you know -- I mean, they're
6 part of -- they are one of the distributors and
7 booksellers. And so, you know, their decision about
8 whether or not to -- how to rank Lonesome Dove seems to
9 me to be an important decision in terms of -- and if
10 they're not going to get any guidance -- if they look out
11 and they see that a competitor has rated something
12 differently, then they may want to change it. I'm just
13 saying this ambiguity in the law doesn't seem to be very
14 helpful.

15 MS. CELLA: Again, I would point that that is not
16 plaintiffs' issue to bring. They don't have standing. To
17 your point, though, TEA can deal with that. It's in the
18 statute that they can deal with any rating or incorrect
19 rating in their view. So that's TEA's issue. That's not
20 -- that doesn't make it ambiguous or vague as to
21 plaintiffs. Plaintiffs rate the books based on the
22 statute, submit their lists to TEA. There's nothing
23 further in the statute other than to change a rating that
24 TEA feels is incorrect.

25 THE COURT: Okay. Thank you. I'm sorry to just

11:23:13 1 pop that on you.

11:23:14 2 And, Ms. Prather, you're certainly welcome to say
11:23:17 3 anything you care to about that issue, as well.

11:23:25 4 MS. PRATHER: Your Honor, what you pointed out is
11:23:32 5 quintessential unconstitutional vagueness.

11:23:35 6 THE COURT: Let's say I'm right and I think I am.
11:23:39 7 I think there are issues. But help me just -- I just need
11:23:42 8 you to help me with the -- y'all's standing to raise the
11:23:46 9 issue.

11:23:47 10 MS. PRATHER: It's going to harm our clients to
11:23:48 11 have to rate the books and to rate the books under an
11:23:52 12 indefinite statute is a problem.

11:23:55 13 THE COURT: I got -- you've made that point and I
11:23:58 14 got it. My question is, does it hurt your clients -- how
11:24:06 15 does it injure your clients and how do they have standing
11:24:08 16 to raise the issue I just did, which is that there could
11:24:11 17 be a multitude of different books getting different
11:24:17 18 ratings and the TEA, number one, there's no system in
11:24:21 19 place for them to resolve it at all. Two, how they
11:24:26 20 resolve it is sort of, you know, man behind the -- it's
11:24:30 21 Wizard of Oz. It's the man behind the curtain that's
11:24:34 22 going to decide it and y'all have to live with it.

11:24:36 23 But I'm just saying how does it -- it doesn't
11:24:40 24 sound very good to me that you have all these different
11:24:43 25 ratings on books because there are going to be different

11:24:46 1 companies if they all comply and do it but I'm just -- how
11:24:50 2 would it -- how would just that one problem damage your
11:24:54 3 clients?

11:24:55 4 MS. PRATHER: Because some of my clients might
11:24:59 5 rate a book one way and some might rate the other and that
11:25:02 6 rating is going to impact them beyond the school districts
11:25:05 7 in the state of Texas.

11:25:06 8 THE COURT: So your argument is that the reality
11:25:15 9 of the world is that your clients will have to have one
11:25:19 10 eye on the rating they do for the school district and
11:25:25 11 then, a concern that it will impact them in 49 other
11:25:29 12 states, for example.

11:25:31 13 MS. PRATHER: Absolutely.

11:25:31 14 THE COURT: And everywhere else. Probably more
11:25:34 15 so for the publishers than the -- well, for Barnes &
11:25:37 16 Noble, they're in all 50 states and also, online. I got
11:25:43 17 it. Now that I've kind of rambled and talked about it, I
11:25:48 18 have figured out your issue on that.

11:25:50 19 Is there anything else you wanted to say?

11:25:52 20 MS. CELLA: One thing, your Honor.

11:25:53 21 THE COURT: Please. Whatever you care to.

11:25:57 22 MS. CELLA: I did just want to point out that the
11:26:01 23 statute is effective September 1st and as we know, lists
11:26:04 24 are not due till April 1st. That gives TEA and any other
11:26:08 25 agencies that need to seven months to determine and come

11:26:11 1 up with rules on how to deal with any issues like that.

11:26:15 2 THE COURT: Gosh, I have so much faith in our
11:26:19 3 governments that they would do that. Have you ever had to
11:26:27 4 like get a roof fixed on a federal building?

11:26:31 5 MS. CELLA: I have not.

11:26:32 6 THE COURT: But that's a different issue. But
11:26:38 7 beyond your, I'm sure, well-intended and good-faith belief
11:26:41 8 that the TEA will -- would do something between now and
11:26:45 9 April 1st to clarify some of the issues that have been
11:26:50 10 raised here, do you have any -- anything more than that
11:26:54 11 you can tell me why you believe that they actually will?

11:26:57 12 MS. CELLA: Nothing else, your Honor, other than,
11:26:59 13 you know, they will.

11:27:01 14 THE COURT: Then why just my belief in good
11:27:06 15 government?

11:27:06 16 MS. CELLA: They do have a good-faith obligation
11:27:08 17 to comply with this law, as well. So...

11:27:11 18 THE COURT: Well, they have -- sure, they have,
11:27:14 19 but I don't know why -- let me ask you a question. If the
11:27:21 20 TEA does nothing between now and April 1st in any respect
11:27:25 21 with this act, they don't give any help with regard to
11:27:31 22 what is meant by sexually explicit if they do nothing, if
11:27:34 23 they just sit on their hands, so what. I mean, is there
11:27:39 24 anything in -- I get there's a good faith, I would think.
11:27:42 25 Maybe there's a good faith. I don't know if there is a

11:27:44 1 good-faith requirement, but if they don't do anything, who
11:27:52 2 can do anything about it?

11:27:53 3 MS. CELLA: Well, it's TEA's oversight so they
11:27:56 4 would have to do something if they're going to.

11:27:58 5 THE COURT: Right. If they're going to and
11:28:02 6 that's my point is, I'd like to think maybe -- your
11:28:05 7 argument is, we've got the window where they could.

11:28:08 8 MS. CELLA: Right. But that's also not fatal to
11:28:11 9 the statute.

11:28:13 10 THE COURT: Okay. I just wanted -- I thought
11:28:16 11 maybe you had some reason to believe that there actually
11:28:19 12 would be action, that you knew action was being planned on
11:28:23 13 being taken, but my sense is you don't.

11:28:26 14 MS. CELLA: Other than I know that they are
11:28:29 15 deeply looking at all of their statutes on how to comply
11:28:32 16 with all of them. You know, the new statutes that have
11:28:34 17 come out.

11:28:35 18 THE COURT: Okay. Ms. Prather, anything else?

11:28:37 19 MS. PRATHER: (Moves head side to side.)

11:28:38 20 THE COURT: Thank you all for being here.

21 (Proceedings concluded.)

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UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Certified Realtime Reporter,
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*LILY I. REZNIK, CRR, RMR*  
*Official Court Reporter*  
*United States District Court*  
*Austin Division*  
*501 West 5th Street,*  
*Suite 4153*  
*Austin, Texas 78701*  
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